90-923

No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

BILLY LAMB and CARMON WILLIS

Petitioners,

VS.

PHILIP MORRIS, INCORPORATED,

and

B.A.T. INDUSTRIES, PLC.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an implied private right of action exist under the Foreign Corrupt Practices Act of 1977, as codified at 15 U.S.C. §§78dd-1, 78dd-2?

2. Does the Foreign Trade Antitrust Improvements Act of 1982, as codified at 15 U.S.C. §6a (1982), make more stringent the jurisdictional standard for an antitrust complaint alleging a conspiracy to fix prices of imported commerce?

LIST OF PARTIES

The parties to the proceedings below were the petitioners Billy Lamb and Carmon Willis, and the respondents Philip Morris, Inc. and B.A.T. Industries, PLC. Katherine Graddy was an original plaintiff before the United States District Court for the Eastern District of Kentucky, but she did not join in the appeal to the United States Sixth Circuit Court of Appeals.

The respondents before this Court include Philip Morris, Inc. and B.A.T. Industries, PLC.

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IN THE SUPREME COURT OF
THE UNITED STATES

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BILLY LAMB and CARMON WILLIS, Petitioners,

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PHILIP MORRIS, INCORPORATED,

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B.A.T. INDUSTRIES, PLC, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH DISTRICT

The petitioners, Billy Lamb and Carmon Willis respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceedings on September 29, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 915 F.2d 1024, and is reprinted in the appendix hereto, p. 1a, infra.

The memorandum decision of the United States District Court for the Eastern District of Kentucky (Reed, D.J.) has not been reported. It is reprinted in the appendix hereto, p. 1b, infra.

JURISDICTION

Invoking federal jurisdiction under the Sherman Act, 15 U.S.C. §1 et seq., the Clayton Act, 15 U.S.C. §12 et seq., and the Foreign Corrupt Practices Act of 1977, 15 U.S.C. §78dd-1 et seq., and the general jurisdictional and venue statutes codified at 28 U.S.C. §1337 and 15 U.S.C. §15 et seq., the petitioners and Katherine Graddy brought this suit in the Eastern District of Kentucky. On June 28, 1989,

the Eastern District dismissed petitioners' complaint on grounds that it was barred by the Act of State Doctrine and for the additional reason that there is no private cause of action under the Foreign Corrupt Practices Act (FCPA). See p. 1b, infra.

On petitioners' appeal, the Sixth Circuit on September 28, 1990 entered a judgment and opinion reversing the Eastern District's judgment insofar as it was based upon The Act of State Doctrine, but sustaining the District Court's decision that there is no implied private right of action under the FCPA. The Sixth Circuit remanded the case for further ruling on the antitrust claims. See p. 1a, infra. No petition for rehearing was sought.

The jurisdiction to review the judgment of the Sixth Circuit on its affirmance of the District Court as regards the issue of the private right of action under the Foreign

Corrupt Practices Act (FCPA hereinafter) is invoked under 28 U.S.C. §1254 (1).

The jurisdiction to review the issue involving the Foreign Trade Antitrust Improvements Act (FTAIA hereinafter) is likewise invoked under 28 U.S.C. §1254 (1), and on the additional grounds that the Supreme Court may exercise jurisdiction where: (1) the issue is an essential predicate to an Intelligent resolution of other pendant issues: (2) the issue was fully briefed for both the District Court and the Court of Appeals; and (3) the issue is a matter of crucial first impression for most future antitrust cases with foreign commerce implications. Cf. Dandridge V. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 1153 (1970); Vance V. Terrazas, 444 U.S. 252, 100 S.Ct. 540, 62 L.Ed.2d 461 (1980); New York City Transit Authority V. Beazer, 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed. 2d 587 (1979); Regents of the University of California V. Bakke, 438 U.S. 265, 98 S.Ct.

2733, 57 L.Ed.2d 750 (1978).

STATUTES INVOLVED

1. The Foreign Corrupt Practices Act of 1977, 15 U.S.C. §78dd-1 and 78dd-2 prohibits an "issuer" or a "domestic concern" from the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to --"

(1) "any foreign official";

(2) "any foreign political party or official thereof or any candidate for foreign political office"; or

(3) "any person, ..." while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office,"

for purposes of:

(A) (i) influencing any act or decision of such person or foreign official, etc. in his official capacity, or (ii) inducing such a person or foreign official, etc. to do or omit to do any act in violation of the official duty of such official, or

(B) inducing such person or foreign official, etc. to use his or its influence with a foreign government or instrumentability therof to affect or influence any act or decision of such government or instrumentality,

in order to assist such [issuer] [domestic concern] in obtaining business for or with, or directing business to, any person.

2. The Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. §6a states:

[The Sherman] Act shall not apply to conduct involving trade or commerce (other than import trade or commerce),

with foreign nations unless--

(1) such conduct has a direct, substantial, and reasonably foreseeable effect--

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, or a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury

to export business in the United States.

STATEMENT OF THE CASE

This is a class action brought by three Kentucky tobacco growers on behalf of growers in eight Central Kentucky counties. Their complaint alleges that certain activities by the respondents in the United States and in various foreign countries, epitomized by a written contractual agreement involving appellants and citizens of the nation of Venezuela have unlawfully and harmfully affected their ability to market their tobacco by, inter alia, increasing the flood of under-valued imported tobacco into this country in competition with their product. The district court, in its opinion, states that the contract was signed in Venezuela, which is not a fact in evidence nor admitted by the plaintiffs, and it omits that Respondents' alleged wrongdoing involving the Venezuelan written

contract was but one of a number of alleged similar arrangements in which the respondents were involved. The United States Department of Justice, Federal Bureau of Investigation letter of April 6, 1983, filed as an exhibit below, contains the following language in its discussion of the Venezuelan contract:

> =======has received reliable information, which indicates similar transactions have occured between the abovementioned tobacco companies and the countries of Argentina, Mexico, Brazil, Nicaragua and Costa Rica.

Petitioners alleged specifically that on or about May 14, 1982, subsidiaries of respondents herein entered into a contract which violated the Sherman Antitrust Act, as amended, (15 U.S.C. §1, et seq.), the Clayton Act, as amended (15 U.S.C. §12, et seq.), the Robinson-Patman Act, as amended (15 U.S.C. §13 et seq.), and the Foreign Corrupt Practices Act of 1977 (15 U.S.C. §§78dd-1 and 78dd-2). In particular, C.A. Tabacalera National ("CATANA"), a subsidiary of Philip Morris, and C.A. Cigarrera Bigott, SUCS, ("Bigott"), a subsidiary of

B.A.T. entered into a contract with La Fundacion Del Nino (Children's Foundation) of Caracas, Venezuela. Ostensibly, La Fundacion is a private charitable organization that engages in educational and other philanthropic activities on behalf of children who live in the tobacco-growing regions in Venezuela and is headed by the wife of the then president of Venezuela. The contract provided that respondents' subsidiaries would make periodic "donations" in the amount of approximately $12.5 million to the Children's Foundation in exchange for the following consideration by the government of Venezuela: (1) price controls on the future minimum wage paid to workers on respondents' tobacco plantations and factories in Venezuela; (2) no price controls concerning the retail prices these tobacco companies could charge for their cigarettes; (3) the amount of the "donations" made to the Children's Foundation would be deductible from the gross income of

of the tobacco companies for tax purposes; and (4) the tax rates "that affect the manufacture, sale, distribution and commercialization of cigarettes" in effect at the time the tobacco companies entered into this contract with the Children's Foundation (May 14, 1982) would remain unchanged. Petitioners allege that this agreement between these tobacco companies and the Children's Foundation violated the anti-trust laws of the United States because it had an adverse impact on appellants' ability to sell their tobacco on the tobacco markets in central Kentucky. In particular, the agreement created a knowing inducement for a discrimination in price clearly forbidden by 15 U.S.C. §13(c) and (f) of the Robinson-Patman Act.

In sum, the gravamen of the complaint is that by virtue of the tobacco companies' contract with the Children's Foundation in Venezuela, the respondents were able to meet their demand for tobacco by importing increased

quantities of less expensive tobacco from Venezuela and elsewhere, thereby reducing the amount of domestic tobacco purchased by the respondents, such as the burley tobacco grown by the peitioners, which, due to this decreased demand, ultimately had the effect of lowering the price petitioners could obtain for their tobacco on the tobacco markets in Central Kentucky.

The District Court, in a memorandum opinion dated June 28, 1989, dismissed the complaint on grounds that the action is barred by the Act of State Doctrine, and that a private plaintiff has no standing to bring this action under the Foreign Corrupt Practices Act of 1977. The Sixth Circuit Court of Appeals reversed the District Court on the Act of State Doctrine, and sustained the court on The Foreign Corrupt Practices Act.

1. DOES AN IMPLIED PRIVATE RIGHT OF ACTION EXIST UNDER THE FOREIGN CORRUPT PRACTICES ACT OF 1977, AS CODIFIED AT 15 U.S.C. §§78dd-1 and 78dd-2?

The Foreign Corrupt Practices Act of 1977 (FCPA) was passed as a consequence of revelations of foreign and domestic bribes, kickbacks, political payoffs and other questionable financial practices by corporations. It is an amendment to the Securities Exchange Act of 1934. Title I of the 1977 amendment requires issuers of most publically traded securities to comply with specific accounting standards, and provides for civil and criminal liability when an "issuer" or any domestic concern not an issuer uses the mails or any instrumentality of interstate commerce in furtherance certain payoffs "to any foreign official, person, political party, or official therof, or to any [foreign] candidate..."Title II of the legislation deals with required reporting of foreign ownership of domestic corporations.

In the legislative history of the FCPA the House of Representatives report adopted a position stating that the House committee specifically intended the courts to imply a private right of action on behalf of persons who suffer injury from corporate bribery. The language is unequivocal:

> The committee intends that the courts shall recognize a private cause of action based on this legislation, as they have in cases involving other provisions of the Securities Exchange act, on behalf of persons who suffer injury as a result of prohibited corporate bribery. The recognition of such a private cause would enhance the deterrent effect of this legislation and provide a necessary supplement to the enforcement efforts of the Commission and the Department of Justice. (H.R.Rep. No. 640, 95th Cong. at page 10.)

The Securities Exchange Commission has taken the position that the House-Senate Conference Committee adopted the House version of the bill because of its silence on this issue in face of the House report specifically endorsing such a private

right of action.[1] Cognizant that SEC Rulings are not always easily available to a reviewing justice, we have appended a copy of the cited opinion of the General Counsel in Appendix III to this petition.

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[1](1978) 466 SEC. Reg. and L. Rep. (BNA) A-7 (statement of SEC General Counsel Harvey Pitt); (1978) 452 SEC. Reg. and L.Rep. (BNA) A-6 (statement of Harvey Pitt); (1978 Transfer Binder) Fed. SEC. L.Rep. (CCH) §81, 701 (SEC Opinion Letter); (1978) 441 SEC. Reg. and L.Rep. (BNA) G-1 (SEC Release No. 34-14, 478). In addition, the Chairman of the SEC, Harold M. Williams, declared both in his testimony and his prepared statement that "(T) his legislation would furnish the Commission and private plaintiffs (in implied actions) with potent new tools to employ against those who persist in concealing from the investing public the manner in which corporate funds have been utilized." Chairman Williams' view is particularly significant since the Court has recognized that the views of an administrative agency are entitled to particular weight where, as here, "the administrators participated in drafting (the legislation) and directly made known their views to Congress in committee hearings."

One of the primary reasons why this court should grant certiorari in this case is the clear conflict in the understanding about the existence of such private actions between the SEC and the United States Department of Justice. In its amicus curiae brief to this court in Environmental Techtonics Corporation International V. W.S. Kirkpatrick & Company, Inc., ___U.S.____, 110 S.Ct. 701, 107 L.Ed 2d 816 (1990), the Solicitor General argued that:

> [T]he prohibited-payment provisions of the FCPA were not enacted for the especial benefit of competitors. Rather, Congress sought to benefit the Nation as a whole, by promoting what it believed to be the Nation's foreign policy interests and the interests and the interests of the entire business and financial community.[2]

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[2]Brief for the United States as amicus curiae at 35, Environmental Techtonics Corporation, supra. very notably, the underpinning rationale for this position of the Solicitor General was that "litigation...based on alleged corruption in the award of contracts or other commercially oriented activities of foreign governments could sufficiently touch on national nerves that the Act of State Doctrine or related principles of abstention would appropriately be found to bar the suit." This quoted reasoning was specifically rejected out of hand by Justice Scalia speaking for the unanimous court in Environmental Techtonics, supra, at page 706 of the opinion.

The SEC and Justice Department conflict does not, however, fully illuminate the extensive Congressional debate over whether there should be a private right of action under the act. For a thorough tracing of the legislative history of this aspect of the Act, we commend to the court the splendid law journal note of Professor Mary Siegel, of The American University College of Law: "The Implication Doctrine and the Foreign Corrupt Practices Act," 79 Colum. L. Rev. 1085 (1979). Professor Siegel concludes that an implied private action for injunctive relief should apply to the bribery provisions of the Act, but not to the accounting provisions. Her reasons are cogent. Supra at page 115f.

Very frankly, it is the private action for injunctive relief which petitioners Lamb and Willis seek most earnestly from this court. (Monetary damages, obviously, are more generously compensated under an antitrust theory.) If permitted to do so, petitioners

will argue to this court that a different, and a more relaxed, standard for implication of private causes of action should exist for injunctive relief just as it exists for conferring standing to enjoin other threatened injuries.[3]

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[3]The Supreme Court has noted in United States v. Scrap, 412 U.S. 669, 689 n. 14, 93 S.Ct. 2405, 2417 n. 14, 37 L.Ed.2d 254 (1973):

> We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, see Baker v. Carr, 369 U.S. 186 [82 S.Ct. 691, 7 L.Ed.2d 663 (1962)]; a $5 fine and costs, see McGowan v. Maryland, 366 U.S. 420 [81 S.Ct. 1101, 6 L.Ed.2d 393 (1961)]; and a $1.50 poll tax. Harper v. Virginia Bd. of Elections, 383 U.S. 663 [86 S.Ct. 1079, 16 L.Ed.2d 169 (1966)]... As Professor Davis has put it: "The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." Davis, Standing: Taxpayers and Others, 35 U.Chi.L.Rev. 601, 613. See Also K. Davis, Administrative Law Treatise §§ 22.09-5, 22.09-6 (Supp. 1970).

Other than the Sixth Circuit in the case at hand, no court has yet faced squarely the issue of whether private rights of action exist for parties injured by payments proscribed by the FCPA. In several cases, however, federal courts have reached conflicting views on closely related implied actions under the FCPA. In three decisions, federal courts have permitted a defendant to raise the defense of violation of the FCPA by a plaintiff as an affirmative defense denying recovery as a violation of public policy. Cf. Sedco Intern., S.A. v. Cory, 683 F.2d 1201, 1210. (8th Cir. 1982): Instituto Nacional v. Continental Illinois National Bank, 576 F.Supp. 985, 990 (N.D. Ill., 1983); Northrop Corp. v. Triad Financial Establishment, 593 F.Supp. 928 (C.D. Cal. 1984). In the Continental Illinois case this was recognized as embodying the same issues as whether to grant a private right of action (at page 900).

In two other cases interpreting Title II of the FCPA dealing with the required disclosure of foreign ownership of stock in United States Companies the courts found an implied private right of action on the grounds that such had been judicially recognized in similar portions of the 1934 act prior to its 1977 amendment. Significantly, both these courts looked at the legislative history of the 1977 amendments (i.e. the very same legislative history which Title I of the act dealing with the bribery provisions is based) and found that Congress had intended to permit private causes of action in its 1977 amendment. Cf. Indiana National Corp. v. Rich, 712 F.2d 1180, 1184 (7th Cir. 1983), and Jacobs v. Pabst Brewing Co., 549 F.Supp. 1050, 1062.

Judge Guy, writing for the Sixth Circuit in the case at bar, candidly acknowledged that his holding is in direct conflict with the holding in Jacobs, supra. at page 1029 of his opinion, footnote 12.

Four other federal courts, looking at different provisions of the 1977 amendment (but at the same legislative history) have concluded that no private cause of action was intended. Cf. McLean v. International Harvester Co., 817 F.2d 1214 (5th Cir. 1987); Lewis v. Sporck, 612 F.Supp. 1316 (N.D. Cal. 1985); Eisenberger v. Spectex Industries, Inc., 644 F.Supp. 48 (E.D.N.Y. 1986); Shields v. Erickson, 710 F.Supp. 686 (N.D. Ill. 1989).

The conflict in the circuits on this issue warrants an opinion by the Supreme Court resolving the question.

2. DOES THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1982, AS CODIFIED AT 15 U.S.C. §6a (1982), MAKE MORE STRINGENT THE JURISDICTIONAL STANDARD FOR AN ANTITRUST COMPLAINT ALLEGING A CONSPIRACY TO FIX PRICES OF IMPORTED COMMERCE?

In their briefs before both courts below, both defendants and plaintiffs concurred that the Foreign Trade Antitrust Improvements Act of 1982 is no model of legislative clarity.

Its parenthetical phrase "...(other than import trade or import commerce),..." gave counsel for each party long periods of reflection. Interestingly,the defendants, themselves, in their briefs arrived at radically different understandings of the meaning of this language. Defendant/Appellee B.A.T. Industries, PLC agreed with the plaintiffs that: "The FTAIA does not limit subject matter jurisdiction in antitrust cases involving import trade or import commerce". Cf. Brief for B.A.T. Industties, PLC before the Sixth Circuit Court of Appeals at 19. Lamb No. 89-5960. B.A.T. then argued that its complained-of activities were properly characterized as export commerce, and were thereby governed by the stringent jurisdictional standards of the FTAIA.

Defendant/Appellee Philip Morris, on the other hand, took the position that the FTAIA clarifies subject matter jurisdiction for all international business transactions, including

acts that restrain imports. Philip Morris cited various excerpts from the legislative history of the act and a quotation from the head of the Antitrust Division of the Department of Justice to support its position, that plaintiffs' complaint, which dealt with alleged import restrains as PMI saw it, was governed by the act. Cf. Brief for Philip Morris, Inc. before the Sixth Circuit Court of Appeals at 18f, Lamb No. 89-5960.

There is no question that the act will have a heavy impact on many antitrust complaints filed after its effective date of October 8, 1982. Few activities of multinational corporations can be said not to arguably involve "trade or commerce with foreign nations". If all such activities, including per se violations of the Sherman Act, must have "a direct, substantial and reasonably foreseeable effect" on commerce to be justiciable, the door has indeed been opened wide to encourage many

many activities formerly subject not only to treble damages, but to criminal sanctions as well. Particularly is the foreseeability standard problematic, since it insulates subjective wrongful motives of defendants from inquiry.

The issue at bar is whether the language of the act and its legislative history substantiate application of the standards of the law to import related trade or commerce, as Philip Morris earnestly asserts. If this is true, successful antitrust suits involving foreign trade will be virtually legislated out of the courts.

On the contrary, if the parenthetical language of the act is taken in its plain, unvarnished meaning, the words seem to say that Congress intended that the Sherman Act should apply to activities in foreign countries that have no direct, substantial or reasonably foreseeable effect on import trade or import commerce!

This would, of course, make less strict, not more stringent, the standards for justiciability of an import related antitrust activity. Petitioners would argue that the legislative history of the act contemplates this interpretation.

In any event, the statute is a very crucial piece of legislation involving not only the case at bar but all future foreign trade antitrust suits. There is presently no federal case, district court or appellate court, construing its abstruse language.

An interpretation by this court is called for.

CONCLUSION

In light of the need for a resolution in the conflict in interpretations among the circuits, and between the SEC and the Justice Department, regarding the existence of private causes of action under the FCPA, this Honorable Court is urged to approve this Petition.

In light of the heavy implications not only for the case at bar, but for all future antitrust complaints involving foreign trade, this court is urged to give guidance to interpretation of the FTAIA by addressing the meaning of the parenthetical phrase in the act "...(other than inport trade or commerce),..."

Petitioners therefore respectfully request that this Petition be approved, and that a writ of certiorari be granted.

Dated: Richmond, Kentucky, December 7, 1990.

Respectfully submitted,

John F. Lackey
Counsel of Record for
Petitioners

90-923

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APPENDIX

CONTENTS

APPENDIX I

RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24

No. 89-5960

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

* * * * * * * *

BILLY LAMB AND CARMON WILLIS, Plaintiffs-Appellants,	)	ON APPEAL from the United States District Court for the Eastern District of Kentucky.
v.	)	
PHILLIP MORRIS, INC. and B.A.T. INDUSTRIES, PLC, Defendants-Appellees.	)	

* * * * * * * *

Decided and Filed September 28, 1990

* * * * * * * *

Before: KEITH and GUY, Circuit Judges; and BROWN, Senior Circuit Judge.

GUY, Circuit Judge. In this antitrust action, plaintiffs Billy Lamb and Carmon Willis appeal from the dismissal of their claims against defendants Phillip Morris, Inc. (Phillip Morris), and B.A.T. Industries, PLC (B.A.T.). Because we find that the act of state doctrine

presents no impediment to adjudication of the plaintiffs' antitrust claims, we reverse the district court's dismissal of those claims and remand them for further consideration. Since we find that no private right of action is available under the Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. §§78dd-1, 77dd-2, we affirm the dismissal of the plaintiffs' FCPA claim.

I.

In accordance with Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc., 854 F.2d 135 (6th Cir. 1988), we must accept as true all factual allegations in the complaint when reviewing the granting of a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss. Id. at 136. Moreover, dismissal under Rule 12(b)(6) is appropriate only "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); accord Morgan v.

Church's Fried Chicken, 829 F.2d 10, 12 (6th Cir. 1987). Therefore, we shall set forth the facts as alleged in the plaintiffs' complaint.

Plaintiffs Lamb and Willis, along with various other Kentucky growers,[1] produce burley tobacco for use in cigarettes and other tobacco products. Defendants Phillip Morris and B.A.T. routinely purchase such tobacco not only from Kentucky markets serviced by the plaintiffs, but also from producers in several foreign countries. Thus, tobacco grown in Kentucky competes directly with tobacco grown abroad,

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[1]The plaintiffs' complaint requests certification under Federal Rule of Civil Procedure 23 of a class encompassing "all persons who sold burley tobacco grown within the counties of Scott, Madison, Jessamine, Bourbon, Fayette, Mercer, Clark, and Woodford in the State of Kentucky, who consummated such sales of burley tobacco within the past six (6) years." As the district court observed in dismissing the complaint, however, the plaintiffs never moved for class certification.

and any purchases from foreign suppliers necessarily reduce the defendants' purchase of domestic tobacco.

On May 14, 1982, a Phillip Morris subsidiary known as C.A. Tabacalera National and a B.A.T. subsidiary known as C.A. Cigarrera Bigott, SUCS. entered into a contract with La Fundacion Del Nino (the Children's Foundation) of Caracas, Venezuela. The agreement was signed on behalf of the Children's Foundation by the organization's president, the wife of the then President of Venezuela. Under the terms of the agreement, the two subsidiaries were to make periodic donations to the Children's Foundation totalling approximately $12.5 million dollars. In exchange, the subsidiaries were to obtain price controls on Venezuelan tobacco, elimination of controls on retail cigarette prices in Venezuela, tax deductions for the donations, and assurances that existing tax rates applicable to tobacco companies would not be

increased. According to the plaintiffs' complaint, the defendants have arranged similar contracts in Argentina, Brazil, Costa Rica, Mexico, and Nicaragua.

In the plaintiffs' view, the donations promised by the defendants' subsidiaries amount to unlawful inducements designed and intended to restrain trade. The plaintiffs assert that such arrangements result in artificial depression of tobacco prices to the detriment of domestic tobacco growers, while ensuring lucrative retail prices for tobacco products sold abroad. In this action, the plaintiffs seek redress in the forms of treble damages and injunctive relief principally for the former result - reduction in domestic tobacco prices.

The plaintiffs filed their complaint alleging violations of federal antitrust laws on August 21, 1985, in the United States District Court for the Eastern District of Kentucky. Both

defendants promptly moved for dismissal on several grounds. The plaintiffs then sought leave to amend their complaint to add a claim under the FCPA. On June 28, 1989, the district court dismissed the plaintiffs' antitrust claims as barred by the act of state doctrine, and dismissed the FCPA claim as an impermissible private action. This appeal followed.

The plaintiffs contend that the district court erroneously abdicated its authority to consider the antitrust claims asserted in the complaint by invoking the act of state doctrine. The plaintiffs further assert that the district court erred in prohibiting them from pursuing a private cause of action under the FCPA. We shall address these two issues individually. Our review of the district court's ruling on the defendants' Rule 12(b)(6) motion is de novo. See, e.g., Peck v. General Motors Corp., 894 F.2d 844, 846 (6th Cir. 1990).

II.

"The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory."[2] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964). As the Supreme Court explained in Underhill v. Hernandez, 168 U.S. 250 (1897), this concept is based on the notion that "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Id. at 252; see

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[2]The Second Circuit has stated that "[s]uch an inquiry is foreclosed...regardless of whether the foreign government is named as a party to the suit or whether the validity of its actions are directly challenged in the pleadings." O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A., 830 F.2d 449, 452 (2d Cir. 1987). cert. denied, 109 S. Ct. 303 (1988).

also Oetjen v. Central Leather Co., 246 U.S. 297, 303 (1918)(reaffirming Underhill). The evolution of the act of state doctrine has revealed that it is not "compelled either by the inherent nature of sovereign authority ... or by some principle of international law." Sabbatine, 376 U.S. at 421. Although the test of the Constitution similarly "does not require the act of state doctrine," id. at 423, the doctrine has "'constitutional' underpinnings ...aris[ing] out of the basic relationships between branches of government in a system of separation of powers" and based upon "the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder" the conduct of foreign affairs. Id.; see also W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l, 110 S. Ct. 701, 704 (1990). In this respect, "[t]he act of state doctrine is not a jurisdictional limit on

courts, but rather is 'a prudential doctrine designed to avoid judicial action in sensitive areas.'"[3] Liu v. Republic of China, 892 F.2d 1419, 1431 (9th Cir. 1989); accord Riedel v. Bancam, S.A., 792 F.2d 587, 592 (6th Cir. 1986).

Although the act of state doctrine typically involves an assessment of "the likely impact on international relations that would result from judicial consideration of the foreign sovereign's act," Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 520-21 (2d Cir.), cert. disissed, 473 U.S. 934 (1985), we must initially determine whether the defendants in this case have established

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[3]Because the act of state doctrine imposes no limitations upon the jurisdiction of the federal courts, "[a] motion to dismiss based on the act of state doctrine raises...a Rule 12(b)(6) objection, not a jurisdictional defect." Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597, 602 (9th Cir. 1976).

the factual predicate for application of the act of state doctrine.[4] While act of state analysis is not generally guided by "an inflexible and all-encompassing rule," see Sabbatino, 376 U.S. at 428, the Supreme Court recently indicated that, as a threshold matter, "[a]ct of state issues only arise when a court must decide - that is, when the outcome of the case turns upon - the effect of official action by a foreign sovereign." Kirkpatrick, 110 S.Ct. at 705 (emphasis omitted). Here, the defendants have failed to make such a showing.

The defendants view Justice Holmes' discussion of the act of state doctrine in American Banana Co. v. United Fruit Co., 213 U.S. 347, 357-58 (1909), as supportive of their position that

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[4] "The party moving for the [act of state] doctrine's application has the burden of proving that dismissal is an appropriate response to the circumstances presented in the case." Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052, 1058 (3d Cir. 1988), aff'd, 110 S.Ct. 701 (1990).

the doctrine may be applied if a legal claim impugns the motivations of a foreign state. See also Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 407-08 (9th Cir. 1983), cert. denied, 464 U.S. 1040 (1984); Hunt v. Mobil Oil Corp., 550 F.2d 68, 77 (2d Cir. 1977). However, the Supreme Court's recent decision in Kirkpatrick - a case involving civil RICO and Robinson-Patman Act claims relating to a New Jersey corporation's bribery of Nigerian officials - undercuts their contention by explicitly eschewing the logic of American Banana.[5] The Court explained in

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[5] In the Kirkpatrick Court's estimation, "American Banana was squarely decided on the ground (later substantially overruled) that the antitrust laws had no extraterritorial application," 110 S.Ct. at 705-06 (citation omitted), and any act of state discussion in American Banana was nothing more than dictum subsequently "overcome" by United States v. Sisal Sales Corp. 274 U.S. 268 (1927). See Kirkpatrick, 110 S.Ct. at 706. The Kirkpatrick Court, in fact, cited Sisal for the proposition that, "American Banana notwithstanding, the defendant's actions in obtaining Mexico's enactment of 'discriminating legislation' could form part of the basis for suit under the United States antitrust laws." Id.

Kirkpatrick that the act of state doctrine in its present formulation "does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the act of foreign sovereigns taken within their own jurisdiction shall be deemed valid." 110 S.Ct. at 707. In reaching this conclusion and permitting the plaintiffs' claims to go forward, Justice Scalia's opinion for the unanimous Court held that the act of state doctrine does not "bar[] a court in the United States from entertaining a cause of action that...require[s] imputing to foreign officials an unlawful motivation (the obtaining of bribes) in the performance of...an official act." Id. at 702. Like the bribes underlying the civil RICO and Robinson-Patman act claims in Kirkpatrick, the payments made by the defendants in this case to induce favorable action in Venezuela may support

the plaintiffs' antitrust claims.[6] Because the antitrust claims at issue in this suit merely call into question the contracting parties' motivations and the resulting anticompetitive effects of their agreement, not the validity of any foreign sovereign act, the district court erred in applying the act of state doctrine to dismiss the plaintiffs' claims. Accordingly, the order of dismissal is REVERSED insofar as the antitrust claims are concerned; the claims shall be REMANDED for further consideration.[7]

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[6]The defendants conceded at oral argument that Kirkpatrick undercut the rationale for the district court's decision with regard to the act of state doctrine.

[7]In rejecting the district court's invocation of the act of state doctrine, we do not pass judgment on whether the plaintiffs have set forth viable antitrust claims. The defendants interposed several alternative justifications for dismissal that the district cort has not yet addressed. The defendants are free to raise these arguments to support a subsequent motion for dismissal or summary judgment following remand.

III.

Although the Foreign Corrupt Practices act was enacted more than a decade ago,[8] the question of whether an implied private right of action exists under the FCPA apparently is one of first impression at the federal appellate level.[9] Thus, we must analyze the FCPA, which generally forbids issuers of registered securities and other "domestic concerns" (as well

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[8]The FCPA, initially enacted in 1977, see Pub. L. No. 95-213, §§103(a), 104, 91 Stat. 1494, 1495-98 (1977), has since been reenacted and amended by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§5003(a), 5003(c), 102 Stat. 1107, 1415-24 (1988)(codified at 15 U.S.C. §§78dd-1, 78dd-2).

[9]The Ninth Circuit has applied the act of state doctrine to bar a private plaintiff's claim under the FCPA. See Clayco, 712 F.2d at 408-09. Clayco, however, offers no guidance on the issue before us. Additionally, at least one district court has referred to the issue without resolving it. See, e.g., Instituto Nacional de Comercializacion Agricola (Indeca) v. Continental Illinois Nat'l Bank and Trust Co., 576 F.Supp. 985, 990 & n.4(N.D.Ill. 1983).

as their agents) to endeavor to influence foreign officials by offering, promising, or giving "anything of value," see 15 U.S.C. §§78dd-1(a), 78dd-2(a), to ascertain whether the plaintiffs may assert a private cause of action. The Supreme Court recently explained that:

> In determining whether to infer a private cause of action from a federal statute, our focal point is Congress' intent in enacting the statute. As guides for discerning that intent, we have relied on the four factors set out in Cort v. Ash, 422 U.S. 66,78 (1975), along with other tools of statutory construction. Our focus on congressional intent does not mean that we require evidence that Members of Congress, in enacting the statute, actually had in mind the creation of a private cause of action....The intent of Congress remains the ultimate issue, however, and "unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist."

Thompson v. Thompson, 484 U.S. 174, 179 (1988) (citations omitted). Thus, as Thompson makes clear, our central focus is on congressional

intent, see also Karahalios v. National Fed'n of Fed. Employees, Local 1263, 109 S.Ct. 1282, 1286 (1989), "with an eye toward" the four Cort factors: (1) whether the plaintiffs are among "the class for whose especial benefit" the statute was enacted; (2) whether the legislative history suggests congressional intent to prescribe or proscribe a private cause of action; (3) whether "implying such a remedy for the plaintiff would be 'consistent with the underlying purposes of the legislative scheme'"; and (4) whether the cause of action is "'one traditionally relegated to state law, in an area basically the concern of States, so that it would be inappropriate to infer a cause of action.'" See Chairez v. United States I.N.S., 790 F.2d 544, 546 (6th Cir. 1986) (quoting Cort, 422 U.S. at 78).

A. "Especial Beneficiaries"

The defendants contend, and we agree, that the FCPA was designed with the assistance of the

Securities and Exchange Commission (SEC) to aid federal law enforcement agencies in curbing bribes of foreign officials. According to the Senate report regarding the FCPA, the Senate Committee on Banking, Housing and Urban Affairs initially "ordered reported a bill, S.3664, which incorporated the SEC's recommendations and a direct prohibition against the payment of overseas bribes by any U.S. business concern.[10]

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[10] S.3664, which the committee did not order reported until the end of the 94th Congress in 1976, never became law. However, "[i]n the first session of the 95th Congress,...Senator Proxmire introduced an exact replica of S.3664 ...as S.305 on January 18, 1977, and the bill was again referred to the Senate Banking Committee." Lewis v. Sporck, 612 F.Supp. 1316, 1329 (N.D. Cal. 1985). On May 2, 1977, the committee reported out S.305, [which] passed the Senate on May 5, 1977." Id. at 1329-30 (citations omitted). Following a conference to resolve differences between S.305 and a corresponding House bill, both the Senate and the House passed a compromise bill in December 1977 and the President signed the compromise bill into law soon thereafter. See id. at 1330.

S.Rep.No. 114, 95th Cong., 1st Sess. 2, reprinted in 1977 U.S. Code Cong. & Admin. News 4098, 4099. As the Senate report indicates, the resulting enactment of the FCPA represents a legislative endeavor to promote confidence in international trading relationships and domestic markets; see id. at 3, 1977 U.S. Code Cong. & Admin. News at 4100-01; the authorization of stringent criminal penalties amplifies the foreign policy and law enforcement considerations underlying the FCPA. See, e.g., 15 U.S.C. §78dd-2(g). The House Conference report refers to the "jurisdictional, enforcement, and diplomatic difficulties" of broadening the FCPA's reach see H.R. Conf. Rep. No. 831, 95th Cong., 1st Sess. 14, reprinted in 1977 U.S. Code Cong. & Admin. News 4121, 4126, thereby addressing concerns typically of special interest to law enforcement officials. In light of these comments and the general tenor of the FCPA itself, which requires the Attorney

General to participate actively in encouraging and supervising compliance with the Act,[11] see, e.g., 15 U.S.C. §§78dd-1(e), 78dd-2(f), we find that the FCPA was primarily designed to protect the integrity of American foreign policy and domestic markets, rather than to prevent the use of foreign resources to reduce production costs. The plaintiffs, as competitors of foreign tobacco growers and suppliers of the defendants, cannot claim the status of intended beneficiaries of the congressional enactment under scrutiny.

B. Congressional Intent Concerning Private Rights of Action

Despite the paucity of authority in the legislative history for their position, the

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[11] The Ninth Circuit has noted that, in practice, "[t]he Justice Department and the SEC share enforcement responsibilities under the FCPA. They coordinate enforcement of the Act with the State Department, recognizing the potential foreign policy problems of these actions." Clayco, 712 F.2d at 409 (footnote omitted).

plaintiffs assert that Congress fully intended to permit private rights of action under the FCPA. We disagree. The plaintiffs have identified only one reference in a House report to a private right of action: "The committee intends that courts shall recognize a private cause of action based on this legislation, as they have in cases involving other provisions of the Securities Exchange Act, on behalf of persons who suffer injury as a result of prohibited corporate bribery." H.R. Rep. No. 640, 95th Cong., 1st sess. 10 (1977). Unlike the House, the Senate initially included a provision that expressly conferred a private right of action under the FCPA on competitors. See S.3379, 94th Cong., 2d Sess. §10, 122 Cong. Rec. 12,605, 12,607 (1976). Significantly, the Senate committee deleted that provision. See S.Rep. No. 1031, 94th Cong., 2d Sess. 13 (1976). The availability of a private right of action apparently was never resolved (or

perhaps even raised) at the conference that ultimately produced the compromise bill passed by both houses and signed into law; neither the FCPA as enacted nor the conference report mentions such a cause of action. See 15 U.S.C. §§78dd-1, 78dd-2; H.R. Conf. Rep. No. 831, 95th Cong., 1st Sess., reprinted in 1977 U.S. Code Cong. & Admin. News 4121. Because the conference report accompanying the final legislative compromise makes no mention of a private right of action, we infer that Congress intended no such result.[12] Accordingly, we

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[12] In this regard, we reject the suggestion in Jacobs v. Pabst Brewing Co., 549 F.Supp. 1050, 1062 (D.Del. 1982), that the comment in the House report suggesting the existence of a private right of action trumps contrary statements by two conferees, thereby giving rise to a private cause of action. This sort of reasoning illustrates the problematic nature of divining the true purpose of a conference committee by delving into reports on bills that were discussed at length and modified in conference.

Accordingly, we reject the plaintiffs' assertion that one isolated comment in an earlier House report mandates recognition of a private right of action.[13]

C. Consistency with the Legislative Scheme

Recognition of the plaintiffs' proposed private right of action, in our view, would directly contravene the carefully tailored FCPA scheme presently in place. Congress recently expanded the Attorney General's responsibilities to include facilitating compliance with the FCPA. See 15 U.S.C. §§78dd-1(e), 78dd-2(f). Specifically, the Attorney General must "establish a procedure to provide responses to specific inquiries" by issuers of securities and other domestic

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[13]Speaking only for myself, if writing on a clean slate, I would never infer a private right of action where the legislation itself is silent in that regard. If the courts stopped filling these legislative gaps, Congress would soon stop leaving this question unresolved.

concerns regarding "conformance of their conduct with the Department of Justice's [FCPA] enforcement policy...." 15 U.S.C. §§78dd-1(e)(1), 78dd-2(f)(1). Moreover, the Attorney General must furnish "timely guidance concerning the Department of Justice's [FCPA] enforcement policy...to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to [FCPA] provisions." 15 U.S.C. §§78dd-1(e)(4), 78dd-2(f)(4). Because this legislative action clearly evinces a preference for compliance in lieu of prosecution, the introduction of private plaintiffs interested solely in post-violation enforcement, rather than pre-violation compliance, most assuredly would hinder congressional efforts to protect companies and their employees concerned about FCPA liability.

D. Alternative Avenues of Redress

Regulation of bribery directed at foreign officials cannot be characterized as a matter

traditionally relegated to state control. In this respect, implying a private right of action under the FCPA - a statutory scheme aimed at activities ordinarily undertaken abroad - would not intrude upon matters of state concern. Nevertheless, the international reach of federal antitrust laws dilutes the plaintiffs' assertion that a private cause of action under the FCPA constitutes the only viable mechanism for redressing anticompetitive behavior on a global scale. See Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962); see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 582 n.6 (1986) ("The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce."). Because the potential for recovery under federal antitrust laws in this case belies the plaintiffs' contention that an implied private right of action under the FCPA

is imperative, we attach no significance to the absence of state laws proscribing bribery of foreign officials. More importantly, since none of the Cort factors supports the plaintiffs' private right of action theory, we AFFIRM the district court's dismissal of the FCPA claim.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX II

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 85-340

BILLY LAMB, ET AL., PLAINTIFFS,

VS. ORDER AND JUDGMENT

PHILLIP MORRIS, INC., ET AL., DEFENDANTS.

* * * * * * * *

In accordance with the Memorandum Opinion entered on the same date herewith,

IT IS HEREBY ORDERED AND ADJUDGED, as follows:

1. The motion of defendant Phillip Morris, Ind., to dismiss this action under FRCivP 12(b)(1) and (6) is GRANTED.

2. The motion of defendant B.A.T. Industres, PLC, to dismiss this action under FRCivP 12(b)(1), (2) and (6) is GRANTED.

3. This action is barred by the act of state doctrine and the Foreign Corrupt Practices Act of 1977.

4. Plaintiffs shall have NO RECOVERY from the defendants.

5. This action is DISMISSED and STRICKEN from the docket.

6. There being no just reason for delay, this is a FINAL and APPEALABLE Order and Judgment.

This 28th day of June, 1989.

SCOTT REED, SENIOR JUDGE

Copies to:
John F. Lackey
Robert M. Watt, III
Abe Krash
James Park, Jr.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 85-340

BILLY LAMB, ET AL., ETC., PLAINTIFFS,

VS. MEMORANDUM OPINION

PHILLIP MORRIS, INC., ET AL., DEFENDANTS.

* * * * * * * * * *

I. INTRODUCTION

Plaintiffs, three purported tobacco growers in the Eastern District of Kentucky, bring this antitrust action under the Sherman Antitrust Act, as amended (15 U.S.C. §1, et seq.), the Clayton act, as amended (15 U.S.C. §12, et seq.), and the Robinson-Patman Act, as amended (15 U.S.C. §13 et seq.), and the foreign Corrupt Practices act of 1977 (15 U.S.C. §§78dd-1 and 78dd-2). Plaintiffs allege that jurisdiction and venue are vested in this court by Title 28 U.S.C. §1337 and Title 15 U.S.C. §§15, 22, 26 and 31.

Although plaintiffs have filed no written motion to certify this matter as a class action, pursuant to FRCP 23(a) and (b), within the body of their complaint, plaintiffs state that they bring this action on their own behalf and that of all burley tobacco growers in eight central Kentucky counties (Scott, Madison, Jessamine, Bourbon, Fayette, Mercer, Clark, and Woodford) within the Eastern District of Kentucky, who have sold burley tobacco within the past six (6) years.

Plaintiffs state that the amount of their injury is unknown; however, they seek, inter alia, treble damages of $60 Million, injunctive relief, and an order barring the defendants from using the Panama Canal.

This matter is before the court on the motions of defendants Phillip Morris, Inc. ("Phillip Morris") and B.A.T. Industries, PLC ("B.A.T.") to dismiss this action. While defendants Phillip Morris and B.A.T. have

advanced some common resons for dismissal, B.A.T. also submits reasons for dismissal that are independent of the grounds for dismissal urged by Phillip Morris. These pending motions to dismiss have been fully briefed, heard in open court, and are ripe for consideration.

II. OPERATIVE FACTS

Plaintiffs generally allege that on or about May 14, 1982, subsidiaries of defendants herein entered into a contract in Venezuela which violated the foregoing antitrust laws of the United States. More specifically, plaintiffs allege that C.A. Tabacalera National ("CATANA"), a subsidiary of Phillip MOrris, and C.A. Cagarrera Bigott, SUCS, ("Bigott"), a subsidiary of B.A.T., entered into a contract with La Fundacion Del Nino (Children's Foundation) of Caracas, Venezuela (ostensibly a private charitable organization that engages in educational and other philanthropic activities on behalf of

children who live in the tobacco-growing regions in Venezuela and is headed by the wife of the then president of Venezuela), which provided that these two subsidiaries would make periodic "donations" in the amount of approximately $12.5 Million to the Children's Foundation in exchange for the following consideration by the government of Venezuela: (1) price controls on tobacco grown in Venezuela; (2) no price controls concerning the retail prices the tobacco companies could charge for cigarettes; (3) the amount of the "donations" made to the Children's Foundation would be deductible from the gross income of the tobacco companies; and (4) the tax rates in effect at the time the tobacco companies entered into this contract with the Children's Foundation (May 14, 1982) would remain unchanged. Plaintiffs allege that this agreement between these tobacco companies and the Children's Foundation violated the antitrust laws of the United States because it had an adverse impact on plaintiffs' ability to sell

their burley tobacco on the tobacco markets in central Kentucky.

In sum, the gravamen of the complaint is that by virtue of the tobacco companies' contract with the Children's Foundation in Venezuela, the defendants were able to meet their demand for tobacco by importing increased quantities of less expensive tobacco from Venezuela, thereby reducing the amount of domestic tobacco purchased by the defendants, such as the burley tobacco grown by the plaintiffs, which, due to this decreased demand, ultimately had the effect of lowering the price plaintiffs could obtain for their tobacco on the tobacco markets in central Kentucky.

III. THE MOTIONS TO DISMISS

A. Phillip Morris

Defendant Phillip Morris has moved to dismiss this action for the following reasons: (1) the complaint is barred by the "act of state" doctrine; (2) there is no subject matter jurisdiction; (3) plaintiffs lack standing to

maintain this action; (4) the complaint fails to state a claim for which relief can be granted under the Noerr-Pennington doctrine, and (5) the complaint violates the pleading requirements of Rules 8 and 9 of the Federal Rules of Civil Procedure.

B. B.A.T. Industries, Inc.

Defendant B.A.T. has moved to dismiss this action for the following reasons: (1) lack of subject matter jurisdiction; (2) lack of personal jurisdiction over it; (3) improper venue; and (4) the complaint fails to state a claim for which relief can be granted. Additionally, in connection with its contention that the complaint should be dismissed for lack of personal jurisdiction, B.A.T. has also moved to quash service of process on it.

IV. APPLICABLE LAW

A. The "Act of State" Doctrine

The court shall begin its analysis of this motion to dismiss by reviewing the act of

state doctrine. Plaintiffs allege that defendants violated the antitrust laws by inducing the Children's Foundation to induce in turn the Venezuelan government to adopt the foregoing price controls on its tobacco. Defendants assert that even assuming the truth of this allegation, this claim is barred by the act of state doctrine. The history of this doctrine is found in Kalamazoo Spice Extraction Co. v. The Provisional Military Government of Socialist Ethopia, 729 F.2d 422 (6th Cir. 1984), as follows:

> The act of state doctrine is an exception to the general rule that a court of the United States, where appropriate jurisdictional standards are met, will decide cases before it by choosing the rules appropriate for decision from among various sources of law, including international law. First National City v. Banco Nacional de Cuba, 406 U.S. 759, 763, 92 S.Ct. 1808, 1811, 32 L.Ed.2d 466 (1972). The roots of the doctrine can be traced to Underhill v. Hernandez, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456 (1897) where the Supreme Court held:
>
> > Every Sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the

> government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through means open to be availed of by sovereign powers as between themselves.
>
> Thus, the Supreme Court's decision in Underhill was a recognition that generally the courts of one nation will not sit in judgment on the acts of another nation when those acts occur within the latter's borders.

Kalamazoo, 729 F.2d at 424.

This doctrine was revisited in Hunt v. Mobil Oil Corp., 550 F.2d 68 (2nd Cir. 1977). Hunt, an independent oil company, brought an action against the seven major oil companies for their alleged violations of the Sherman Antitrust Act and the Wilson Tariff Act after Hunt's oil-producing properties were nationalized by Libya on June 11, 1973. Hunt's theory was that the defendants combined and conspired to preserve the competitive advantage of Persian Gulf crude oil over that of Libyan crude oil, which prevented him from successfully dealing with the Libyan government, which ultimately resulted in his oil-producing properties being

confiscated and nationalized by Libya.

In relying on the act of state doctrine, the district court dismissed one of the conspiracy counts. On appeal, the Second Circuit traced the history of this doctrine and held that Hunt's claim was non-justiciable, as follows:

> ...We conclude that the political act complained of here was clearly within the act of state doctrine and that since the disputed pleadings inevitably call for a judgment on the sovereign acts of Libya the claim is non-justiciable.

Hunt, 550 F.2d at 73.

In reaching this conclusion, the Hunt court reviewed how the doctrine had changed sinced its inception in Underhill. The Hunt court noted that the district court relied heavily on American Banana v. United Fruit Co., 213 U.S. 347 (1909), wherein the plaintiff sued for treble damages under the Sherman Act, alleging that his banana plantation had been confiscated by the Costa Rican government, which had acted at the defendant's instigation

in furtherance of anti-competitive behavior. The American Banana Court held that since the seized plantation was within the de facto jurisdiction of Costa Rica, its seizure by that state was an act of sovereign power which would not be litigated in a court in the United States.

American Banana also held that because the acts complained of occurred outside of the United States, they were beyond the jurisdictional scope of the Sherman Act. This portion of American Banana has since been eroded by Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); However, the Hunt court held that neither Continental Ore nor United States v. Sisal Sales Corp., 274 U.S. 268 (1927), sought to discard entirely the act of state doctrine on which American Banana rests.

The Second Circuit also considered Hunt's contention that the act of state doctrine was not applicable because he did not challenge the actions of the Libyan government; instead,

he was only challenging the defendants' alleged unlawful actions which he asserted brought about the nationalization of his oil properties. In analyzing this argument, the Hunt court noted the following:

> Hunt's complaint does not name Libya as a defendant or in any way suggest that it is a co-conspirator of the named defendants. Nonetheless Judge Weinfeld reasoned that the combination or conspiracy charged did not of itself cause the damage complained of but rather that the damage resulted from the action of Libya in cutting back Hunt's production, shutting off its oil and finally nationalizing its properties. Thus he found that Hunt would be required to establish that but for the conspiracy Libya would not have committed any of these aggressive actions. This he decided would require judicial inquiry into "acts and conduct of Libyan officials, Libyan affairs and Libyan policies with respect to plaintiff's as well as other oil producers and the underlying reasons for the Libyan government's actions." 410 F.Supp. at 24. He concluded that this inquiry was foreclosed under the act of state doctrine.

Hunt, 550 F.2d at 72. In rejecting Hunt's argument that the act of state doctrine was not applicable, the Hunt court stated, as follows:

> ...It is well established that a private plaintiff who seeks damages in an antitrust action must allege and establish that his business or property was injured as a direct result of the Sherman Act violation. Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 660, 81 S.Ct. 365, 5 L.Ed.2d 358 (1961); Salerno v. American League of Professional Baseball Clubs, 429 F2d 1003, 1004 (2d Cir. 1970), cert. denied, 400 U.S. 1001, 91 S.Ct. 462, 27 L.Ed.2d 452 (1971).
>
> Appellants do not deny, as they cannot, this proposition of law. Instead they argue that while Hunt must prove a causal connection between Libya's nationalization and the conspiracy charged this has been sufficiently pleaded and somehow shields the third claim from dismissal prior to trial. However, appellants admit that antitrust liability cannot be attributed to the defendants unless Hunt can prove that but for their combination or conspiracy Libya would not have moved against it. Since this nexus is at the heart of the claim we do not understand how Judge Weinfeld could have erred in anticipating that the doctrine of act of state was inescapably raised by the pleadings and thus was a major issue appropriately considered on the motion to dismiss.

Hunt, 550 F.2d at 76.

In affirming the trial court's dismissal of this conspiracy count, the Hunt court also looked to the following teachings:

Mr. Justice Harlan, in analyzing the act of state doctrine in Banco Nacional de Cuba v. Sabbatino, supra, 376 U.S. at 423, 84 S.Ct. at 938, observed:

> It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.

The Dunhill majority has reiterated this view:

> The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations.

Alfred Dunhill of London v. Republic of Cuba, supra, 96 S.Ct. at 1863.

Hunt, 550 F2d at 77.

Defendant Phillip Morris also submits that the present action is controlled by

Occidental Petroleum Corp. v. Buttes Gas & Lil Co., 331 F.Supp. 92 (C.D. Cal. 1971), aff'd., 461 F.2d 1261 (9th Cir. 1972), cert. denied, 409 U.S. 950 (1972), wherein the plaintiffs alleged that the defendants had incited the governments of Sharjah, Iran, and Great Britian to interfere with the plaintiffs' oil concession off the coast of the Trucial States. Plaintiffs asserted that the act of state doctrine was not applicable because they were not attacking the validity of the acts of these foreign governments, but rather only the "defendants' conduct in 'catalyzing' those acts." 331 F.Supp. at 110. The Occidental court found no merit in this argument, as follows:

> ...Because a private antitrust claim requires proof of damage resulting from forbidden conduct, (citations omitted) plaintiffs necessarily ask this court to "sit in judgment" upon the sovereign acts pleaded, whether or not the countries involved are considered co-conspirators. That is, to establish their claim as pleaded plaintiffs must prove, inter alia, that Sharjah issued a fraudulent territorial waters decree, and that Iran laid claim to the island

> of Abu Musa at the behest of the defendants. Plaintiffs say they stand ready to prove the former allegation by use of "internal documents." But such inquiries by this court into the authenticity and motivation of the acts of foreign sovereigns would be the very sources of diplomatic friction and complication that the act of state doctrine aims to avert.

Id.

The Hunt plaintiffs also argued that the act of state doctrine was not applicable because (1) they were not questioning the validity of the acts of the foreign government and (2) the foreign government was not a named defendant. However, the Hunt court, just like the Occidental court, found this position untenable.

Additionally, Phillip Morris relies on Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F2d 404 (9tn Cir. 1983), cert. denied, 464 U.S. 1040 (1984), wherein plaintiff alleged that Occidental had violated the antiturst laws by bribing the officials of Umm Al Qaywayn to secure an off-shore oil concession. In affirming the trial court's dismissal of the

action based on the act of state doctrine, the Ninth Circuit noted the potential for interference with our foreign relations if plaintiffs' claim were to be adjudicated, as follows:

> ...In this case however, the very existence of plaintiffs' claim depends upon establishing that the motivation for the sovereign act was bribery, thus embarrassment would result from adjudication.
>
> This circuit's decisions have similarly limited inquiry which would "impugn or question the nobility of a foreign nations' motivation." Timberland, 549 F.2d at 607. In Buttes, the trial court, in an opinion adopted by this court, held judicial scrutiny of the motivation for foreign sovereign acts to be precluded by the act of state doctrine, noting that it has traditionally barred antitrust claims based on the defendant's alleged inducement of foreign sovereign action. 333 F.Supp. at 110 (citing American Banana Co. v. United Fruit, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909)

Clayco, 712 F.2d at 407-408.

DISCUSSION

In analyzing the merits of the action sub judice, the court is guided by the

teachings of Hunt v. Mobil Oil Corp., supra, Occidental Petroleum Corp. v. Buttes Gas & Oil Co., supra, and Clayco Petroleum Corp. v. Occidental Petroleum Corp., supra. The elements common to all three of these cases are that (1) the plaintiffs were not questioning the validity of the acts of the foreign government, and (2) the foreign government was not a named defendant. In each of these actions, the court declined to inquire into the respective acts of these foreign governments, relying on the act of state doctrine.

As in Hunt, Occidental Petroleum, and Clayco, plaintiffs herein ask this court to examine a policy decision of a foreign sovereign (i.e., the decision of the Venezuelan government to impose price controls on tobacco). The Clayco court noted that the reasons that the government officials of Umm Al Qaywayn awarded the off-shore oil concession to Occidental Petroleum were not merely the background of that action, but rather they were the core of

plaintiffs' claim. The same rationale applies to the present action. The actions of the Venezuelan government in imposing price controls on tobacco are not merely the backdrop of this case, they are the foundation of this action. Plaintiffs herein would not have filed this action had Venezuela not imposed price controls on tobacco.

Therefore, the court is of the opinion that based on controlling precedent, the act of state doctrine bars this court from inquiring into the reasons underlying the decision of the government of Venezuela to impose price controls on tobacco grown in Venezuela.

B. The Foreign Corrupt Practices ACt of 1977

Plaintiffs' complaint has been amended to add a claim that defendants' actions violated the Foreign Corrupt Practices Act of 1977 (FCPA). Both defendants submit that the amended complaint notwithstanding, this action should still be dismissed. Defendants contend that a private party is not authorized to bring an action

under FCPA and that only the government is authorized to seek redress for violations of the FCPA. The remedies for violations thereof are fines imposed after one is convicted in a criminal proceedings. Additionally, the FCPA provides that the United States Attorney General may bring a civil action to enjoin violations.

In short, the gist of defendants' argument is that a private party has no standing to bring a claim under the FCPA. This position is borne out by the Ninth Circuit's explanation of this act in Clayco Petroleum Corp. v. Occidental Petroleum Corp., supra, as follows:

> The FCPA prohibits bribery of a foreign official for the purpose of obtaining or retaining business. 15 U.S.C. §§78dd-1, 78dd-2. The Act provides for severe criminal penalties including fines and imprisonment. 15 U.S.C. §§ 78dd-2(b), 78ff. In addition, the Attorney General may bring a civil action to enjoin impending violations. 15 U.S.C. §78dd-2(c).

Clayco, 712 F.2d at 408.

The Clayco court further elaborated that:

> The Justice Department and the SEC share enforcement responsibilities

> under the FCPA. They coordinate enforcement of the Act with the State Department, recognizing the potential foreign policy problems of these actions.

Clayco, 712 F.2d at 409.

In the final analysis, the Clayco court concluded, as follows:

> Here, however, we are faced with a private lawsuit, rather than a public enforcement action. It is the screening of governmental proceedings, with State Department consultation, which distinguishes FCPA enforcement from private suits.

Id.

DISCUSSION

Although plaintiffs contend that the issue of whether a private plaintiff can bring a cause of action under the FCPA is an open question, Clayco teaches otherwise. It is crystal clear from Clayco that an action under the FCPA can only be maintained by the government. In terms of criminal proceedings, the Justice Department and the Securities and Exchange Commission share enforcement responsibilities of the FCPA; additionally, the Attorney General can bring a civil action to enjoin violations

of the FCPA. Accordingly, the court must conclude that plaintiffs have no standing to bring this action under the FCPA.

In rebutting defendants' motions to dismiss this action based on the act of state doctrine, plaintiffs refer the court to Timberline Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597 (9th Cir. 1977), International Association of Machinists v. OPEC, 649 F.2d 1354 (9th Cir. 1981), and Williams v. Curtiss-Wright Corp., 694 F.2d 300 (3rd Cir. 1982), which plaintiffs assert are "three recent seminal cases" on the act of state doctrine.

The court can only address this contention by observing that both Clayco, supra (a 1983 9th Circuit case), and Kalamazoo Spice, supra (a 1984 6th Circuit case), were rendered subsequent to the foregoing authorities relied on by plaintiffs. In fact, the primary authority of Kalamazoo Spice seems to be the last word from the Sixth Circuit on the act of state doctrine.

Therefore, the court finds no merit in plaintiffs' argument that the act of state doctrine should not apply to this action.

C. The Foreign Trade Antitrust Improvements Act of 1982

Due to the fact that this act was passed on October 8, 1982, subsequent to May 14, 1982, the date the contract about which plaintiffs complain was executed, the parties are in disagreement as to whether this act is applicable to this action. Plaintiffs maintain that it should not be given retroactive application, and the defendants argue that the act is applicable herein because it merely clarified existing law.

However, inasmuch as the court has determined that this action is barred by the act of state doctrine and the Foreign Corrupt Practices Act of 1977, the court need not address this issue or any other remaining issues.

CONCLUSION

In light of the foregoing authorities, the court must conclude that this action is barred by the act of state doctrine. Plaintiffs want this court to scrutinize the policy decision of Venezuela to impose price controls on its domestic tobacco; however, inquiry into such a policy decision is exactly what the act of state doctrine was designed to prevent.

Furthermore, a private plaintiff has no standing to bring this action under the Foreign Corrupt Practices Act of 1977.

An Order and Judgment in accordance with this Memorandum Opinion will be entered on the same date herewith.

This 28th day of June, 1989.

SCOTT REED, SENIOR JUDGE

Copies to:
John Lackey
Robert Watt III
Abe Krash
James Park

APPENDIX III

[¶ 81,701] Opinion of Office of the General Counsel on the Existence of a Private Right of Action Under the Foreign Corrupt Practices Act of 1977.

Letter from Frederick B. Wade, Special Counsel, Office of the General Counsel to Mr. Raymond Garcia, Emergency Committee for American Trade, Washington, D.C. May 16, 1978. Opinion of Special Counsel in full text.

Foreign Corrupt Practices Act - Private Right of Action. - "Private enforcement" of the Foreign Corrupt Practices Act would provide "a necessary supplement" to enforcement actions brought by either the SEC or the Department of Justice and the implication of a private right of action under the Act would be appropriate, in the view of Special Counsel for the SEC's Office of General Counsel.

See ¶ 23,631, "Exchange Act - Registration Reports" division, Volume 2.

[Opinion of Counsel]

This is in response to your letter, dated March 2, 1978, concerning the Commission's release, entitled "Notification of Enactment of Foreign Corrupt Practices Act of 1977."[1] Your letter questions a portion of the release, which states:

> "The legislative history of the Act ***contemplates that private rights of action properly could be implied under the Act on behalf of persons who suffer injury as a result of prohibited corporate bribery."

Whether there should be an implied private right of action under the Foreign Corrupt Practices Act, of course, is ultimately a question that the courts will decide. The determination of that question will require a comprehensive review of the legislative history of the Act, and a consideration of

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[1] Securities Exchange Act Release No. 14478 (Feb. 16, 1978); 14 SEC Docket 180 (Feb. 28, 1978); 43 Fed. Reg. 7752 (Feb. 24, 1978).

the applicable rules of law governing the weight that courts may give to various sources of legislative history.

It is significant, in this regard, that a bill introduced by Senator Frank Church during the 94th Congress, S. 3379, "included two provisions creating new private rights of action for persons injured by the payment of bribes."[2] One of those provisions, which would have created an express right of action on behalf of shareholders, was deleted because the Senate Committee on Banking, Housing and Urban Affiars believed the proposal "would have duplicated and possibly confused existing remedies available to shareholders."[3]

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[2] S. Rep. No. 94-1031, 94th Cong., 2d Sess. 12 (1976).

[3] Id. at 12-13. The use of the word, "duplicated," is a strong indication that the Committee believed it was unnecessary expressly to provide for a private right of action on behalf of shareholders.

The Committee also "found merit" in the second provision, which would have created an express "private cause of action for any person who could establish actual damage to his business resulting from illegal payments made by a competitor," but deleted that proposal on the ground that, as drafted, it "created ambiguities."[4] The Committee added that its decisions were not intended to have "any effect on existing law concerning private causes of action under the present federal securities laws,"[5] under which the courts had provided for implied causes of action under a number of statutory provisions.

An implied private right of action was advocated, prior to enactment of the legislation, during the hearings held by the Subcommittee on Consumer Protection and Finance of the House Committee on Interstate and Foreign

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[4] Id. at 13.

[5] Id.

Commerce.[6] In this regard, the Association of the Bar of the City of New York submitted a report to the Subcommittee stating the Association's view that the legislation, if enacted, would be available to "private plaintiffs in implicit actions * * *."[7] In addition, the Chairman of the Commission, Harold M. Williams, declared both in his testimony,[8] and in his prepared statement,[9] that "this legislation would furnish the Commission and private plaintiffs * * * with potent new tools to employ against those who persist in concealing from the investing public

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[6] See Subcommittee on Consumer Protection and Finance of the House Committee on Interstate and Foreign Commerce, Hearings Concerning the Unlawful Corporate Payments Act of 1977, 95th Cong., 1st Sess. (1977).

[7] Id. at 88.

[8] Id. at 198.

[9] Id. at 219.

the manner in which corporate funds have been utilized" (emphasis supplied).[10] Thereafter, the House report concerning the proposed legislation (H.R. 3815) stated.

> "The Committee intends that the courts shall recognize a private cause of action based on this legislation, as they have in cases involving other provisions of the Securities Exchange Act, on behalf of persons who suffer injury as a result of prohibited corporate bribery. The recognition of such a private cause would enhance the deterrent effect of this legislation and provide a necessary supplement to the enforcement efforts of the Commission and the Department of Justice.[11]

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[10] In this regard, the Supreme Court has recognized that the views of an administrative agency are entitled to particular weight where, as here, "the administrators participated in drafting [the legislation] and directly made known their views to Congress in committee hearings." Zuber v. Allen, 396 U.S. 168, 192 (1969); See United States v. American Trucking Associations, Inc., 310 U.S. 534, 549 (1940).

[11] H.R. Rep. No. 95-640, 95th Cong., 1st Sess. 10 (1977). The word, "persons," is broad enough to encompass an implied cause of action on behalf of both shareholders and competitors of the corporation that may suffer injury as a result of prohibited corporate bribery.

The Report of the Conference Committee, which was established to reconcile the differences between the House and Senate versions of the legislation, indicates that the prohibitations against foreign corporate bribery contained in the Foreign Corrupt Practices Act consist, for the most part, of "the identical provisions of both * *" the Senate and House bills.[12] None of the changes agreed to by the members of the Conference Committee reflect any disagreement with the position of the House that there should be an implied private right of action.[13] Accordingly, the failure of the Conference Committee either to address this issue, or explicitly to retract the statement contained in the House Report, is a strong indication that that statement reflects the intent of the Congress concerning private rights of action.

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[12] H.R. Rep. No. 95-831, 95th Cong., 1st Sess. 11-13 (1977).

[13] Id.

Your letter quotes Senator John G. Tower and Congressman Samuel L. Devine as stating, in substance, that the Conference Committee did not intend to create an implied private right of action. Although Senator Tower and Congressman Devine were both members of the Conference Committee, the probative value of their statements is diminished, in my view, by the fact that they did not persuade the conferees to reflect their views in the Conference Report. In fact, the statement of Senator Tower makes clear that neither he, nor any other member of the Conference Committee, raised the question with the other conferees, despite their opportunity to do so. He states, in this regard, that that "question was not considered * * * during the conference * * *." Thus, there is nothing to indicate that the statements of Senator Tower and Congressman Devine reflect anything more than their own personal views.

The commission's view that private rights of action are contemplated by the Foreign Corrupt Practices Act also finds support in a number of Supreme Court decisions concerning the weight to be given to various sources of legislative history. It has long been established, for example, that congressional debates, prior to the passage of legislation, are "not entitled to the same weight as * * * carefully considered committee reports * * *."[14] In addition, it is a settled rule of statutory construction that "[i]t is the sponsors [of legislation] that * * * [the courts] look to when the meaning of the statutory words is in doubt."[15]

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[14] See, e.G. United States v. United Auto Workers, 352 U.S. 567, 585-586, rehearing denied, 353 U.S. 943 (1957); see also United States v. Wrightwood Dairy Co., 315 U.S. 110, 125 (1942).

[15] See, e.g., National Labor Relations Board v. Fruit & Vegetable Packers & Warehousemen, 377 U.S. 58, 66 (1964).

And, it bears emphasis, in this context, that the Supreme Court has declared that legislators with minority views "cannot put words into the months of the majority and thus, indirectly, amend a bill."[16]

Neither Senator Tower nor Congressman Devine were sponsors of the proposed bills that were reported by the committees of the Senate and the House responsible for consideration of the legislation. In fact, Congressman Devine joined in a minority report concerning the House version of the bill that expressed strong opposition to certain features of the measure, including the approach that the majority of the Committee had adopted with re-

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[16] Mastro Plastics Corp. v. National Labor Relations Board, 350 U.S. 270, 288, rehearing denied, 351 U.S. 980 (1956).

(3)

No. 90-923

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BILLY LAMB and CARMON WILLIS,
Petitioners,

v.

PHILIP MORRIS INCORPORATED

and

B.A.T. INDUSTRIES, PLC,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENT PHILIP MORRIS INCORPORATED IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RULE 29.1 STATEMENT

Pursuant to Supreme Court Rule 29.1, respondent states that, pursuant to a corporate reorganization, Philip Morris Companies Inc. has succeeded Philip Morris Incorporated. Philip Morris Companies Inc. has no parent company and no subsidiaries (except for wholly owned subsidiaries).

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COUNTERSTATEMENT OF THE CASE

This is a strike suit. The core of petitioners' case is their claim that respondents made a contribution to a Venezuelan charity. In return, petitioners contend that the charity induced the Venezuelan government to set artificially low prices and tax rates for tobacco grown in Venezuela. These actions by the Venezuelan government

allegedly generated a "flood of undervalued imported tobacco into this country" at prices so low that petitioners, domestic growers of burley tobacco, could not compete. (Pet. at 8.) Petitioners assert that respondents' charitable contributions therefore violated both the federal antitrust laws and the Foreign Corrupt Practices Act of 1977 (the "FCPA").

Petitioners' statement of the case omits two crucial facts. *First*, their claim that there was a "flood" of Venezuelan tobacco into this country is demonstrably false. U.S. government statistics show no flood—indeed, they show barely a trickle—of imported tobacco from Venezuela.[1] Absent this imaginary deluge of cheap foreign tobacco, petitioners' case collapses.

Second, petitioners neglect to mention that the U.S. government previously investigated respondents' charitable contributions and found no basis for a claim under the FCPA. Petitioners refer to a letter from the Department of Justice regarding that investigation (Pet. at 9), but choose not to provide a copy to the Court, for the simple reason that the Department concluded that no further action was warranted since there was no "evidence of a payment to a foreign official."

The foregoing facts demonstrate that the complaint is totally devoid of merit.

SUMMARY OF ARGUMENT

There is no basis for granting certiorari. *First*, there is no conflict among the circuits; indeed, prior to this case there were no courts of appeals decisions regarding the availability of a private right of action under the FCPA. *Second*, review should be denied because the de-

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[1] According to the government statistics, there were *no* imports of burley tobacco (the type grown by petitioners) from Venezuela during the relevant time period, and imports of all types of tobacco leaf from Venezuela accounted for approximately one ten-thousandth (.0001) of the U.S. domestic sales of tobacco in the same period.

cision below is interlocutory, and there are not extraordinary circumstances requiring immediate review. *Finally*, the decision of the court of appeals is clearly correct.

REASONS FOR DENYING THE WRIT

I. CERTIORARI SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUITS

Petitioners' principal basis for requesting review of the Sixth Circuit's decision that there is no private right of action under the FCPA is a series of alleged "conflicts." (Pet. at 16-21.) This claim is baseless.

First, and most importantly, there is no conflict among the circuits. As the court of appeals stated, "the question of whether an implied right of action exists under the FCPA apparently is one of first impression at the federal appellate level." (App. at 14a.) In the absence of a conflict among the circuits, there is no reason for this Court to intervene. *See* Supreme Court Rule 10(a).

Lacking a conflict among the circuits, petitioners contend that the decision of the Sixth Circuit conflicts with a district court case which referred to the legislative history of the FCPA. *Jacobs* v. *Pabst Brewing Co.*, 549 F. Supp. 1050 (D. Del. 1982). (Pet. at 20.) That case, however, involved the existence of a private right of action under the disclosure provisions of the Williams Act, and those are not relevant here. In any event, it is well established that an alleged conflict between a court of appeals decision and a district court decision is not sufficient grounds for granting certiorari. *See* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.8 at 207 (6th ed. 1986).

Petitioners also assert that the decision of the court of appeals conflicts with three decisions which have allowed defendants to assert the plaintiff's violation of the FCPA as an affirmative defense. (Pet. at 19.) None of these

cases held that the FCPA creates a private cause of action, and accordingly this alleged "conflict" is no conflict at all.[2] Indeed, as petitioners concede, there can be no conflict among the circuits because, "[o]ther than the Sixth Circuit in the case at hand, no court has yet faced squarely the issue of whether private rights of action exist for parties injured by payments proscribed by the FCPA." (Pet. at 19.) There is no conflict.

II. CERTIORARI SHOULD BE DENIED BECAUSE THE JUDGMENT BELOW IS INTERLOCUTORY

Review of the Sixth Circuit's decision is inappropriate because there has been no final judgment in the present case. The court of appeals affirmed the judgment of the district court dismissing the complaint with respect to the FCPA, but remanded the antitrust claims to the district court "for further consideration." (App. at 13a.) Thus, the case below is still at an early stage.[3]

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[2] Petitioners' claim that certiorari should be granted to resolve an alleged conflict between the Department of Justice and the SEC (Pet. at 14-16) is even weaker. Neither agency is involved in this case, and, in any event, this Court has held that the views of the SEC regarding an implied right of action under the securities laws should be accorded little weight. *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 41 n.27 (1977).

[3] Following the decision of the court of appeals, respondent moved to dismiss petitioners' antitrust claims on the following grounds: (1) there is no subject matter jurisdiction under the Foreign Trade Antitrust Improvements Act of 1982 because respondent's charitable contributions did not have a "direct, substantial and reasonably foreseeable effect" on U.S. commerce; (2) petitioners have not suffered any "antitrust injury" under *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 110 S. Ct. 1884 (1990); (3) petitioners lack standing because the nexus, if any, between the conduct of which they complain and the injury they allege is remote, indirect and tangential; (4) the conduct of which petitioners complain is protected under the *Noerr-Pennington* doctrine; and (5) the complaint violates the requirements of Rules 8 and 9 of the Federal Rules of Civil Procedure. Respondent's motion is presently pending before the district court.

It is well established that certiorari to review interlocutory decisions will usually be denied unless exceptional circumstances require immediate review. As the Court stated in *American Construction Co.* v. *Jacksonville, Tampa and Key West Railway Co.*, 148 U.S. 372, 384 (1893), "this court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *Accord Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostoock Railroad Co.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ is not issued until final decree"); *Estelle* v. *Gamble*, 429 U.S. 97, 114-15 (1976) (Stevens, J., dissenting).

No such extraordinary circumstances are present here. If the district court dismisses their antitrust claim, petitioners will have ample opportunity to seek appellate review of all issues. If, on the other hand, respondent's motion to dismiss is denied, the addition of a claim under the FCPA would not entitle petitioners to seek any relief they could not seek under the antitrust laws. Thus, granting reveiw at this early date would only encourage piecemeal litigation and delay a final resolution of this case.

Petitioners' request that this Court issue an advisory opinion regarding the scope of the Foreign Trade Antitrust Improvements Act of 1982 (the "FTAIA") is frivolous. Neither the district court nor the court of appeals has ever addressed respondent's claim that there is no subject matter jurisdiction under the FTAIA, which requires a "direct, substantial and reasonably foreseeable effect" on U.S. commerce as a prerequisite for jurisdiction under the antitrust laws.[4] This Court does not grant

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[4] In view of the almost total lack of any tobacco trade between the U.S. and Venezuela, it is inconceivable that petitioners will be able to make such a showing.

certiorari to review issues that the courts below have not addressed.

III. THE DECISION OF THE COURT OF APPEALS IS CLEARLY CORRECT

Finally, certiorari should be denied because the court of appeals' decision that there is no implied private right of action under the FCPA is clearly correct. No provision in the FCPA purports to create a private right of action; the statute provides only for fines upon conviction for specified activities in a criminal proceeding and for civil enforcement actions by the Attorney General. Moreover, the FCPA has been on the books for over twelve years and no court has ever ruled that the statute creates a private right of action.

The court of appeals in the present case carefully considered each of the four factors delineated in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), in concluding that there is no private cause of action under the FCPA. (App. at 16a-25a.) Specifically, that court found as follows:

(1) Petitioners are not members of a class "for whose *especial* benefit the statute was enacted" because the FCPA was enacted to assist law enforcement officials and "to protect the integrity of American foreign policy and domestic markets," not to protect domestic concerns from foreign competition. (App. at 16a-19a.)

(2) Since the conference report for the final bill does not mention a private right of action, there is no basis for finding that Congress intended to create one. (App. 19a-22a.)

(3) Creating a private right of action would be inconsistent with the legislative scheme because it would interfere with the procedures for administrative enforcement. (App. 22a-23a.)

(4) A private right of action is not necessary since the antitrust laws provide a remedy for foreign conduct that affects U.S. commerce. (App. 23a-25a.)

The only authorities petitioners can summon to support their claim for the extraordinary result they seek are a 1978 opinion issued by the General Counsel of the SEC, a 1979 law review article, and a statement in a House Report that is conspicuously absent from the final report of the Conference Committee. H.R. Conf. Rep. No. 831, 95th Cong., 1st Sess. (1977). (Pet. at 14-17.)

Petitioners' reliance on these few items is patently inadequate to support a ruling that there is an implied private right of action in this sensitive area.

This Court has repeatedly rebuffed attempts to imply novel causes of action under the securities laws. *See Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979). As the court of appeals recognized, the same result is appropriate here.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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DATED: January 8, 1991

(4)

No. 90-923

SUPREME COURT OF THE UNITED STATES

October Term, 1990

BILLY LAMB and
CARMON WILLIS - - - - Petitioners

versus

PHILIP MORRIS INCORPORATED
and
B.A.T INDUSTRIES PLC - - - Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT, B.A.T INDUSTRIES PLC

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LIST OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES

Respondent, B.A.T Industries PLC has no parent company. Its subsidiaries and affiliates (other than wholly owned subsidiaries) are:

Allied Dunbar Assurance PLC
B.A.T (Cyprus) Limited
Hellenobretanniki General Insurance SA
Eagle Star Gestora de Fondes de Pensiones SA
W D & H O Willis Holdings Limited
Nobleza-Piccardo SAICyF
Companhia Souza Cruz Industria e Commercio
Industrias Alimenticias Maguary SA
Tabasa-Tabaccos SA
Empresas CCT SA
Republic Tobacco Co
Cigarreria Morazan SA de CV
Tabacalera Nacional SA
Demerara Tobacco Company Limited
Tabacalera Hondurena SA
Tabacalera Nicaraguense SA
Eagle Star Insurance Company of Puerto Rico
Bangladesh Tobacco Company Limited
Tribeni Tissues Limited
PT B.A.T Indonesia
Malaysian Tobacco Company Berhad
Pakistan Tobacco Company Limited
British-American Tobacco Co. (Singapore) Limited
Ceylon Tobacco Company Limited
CTC Eagle Insurance Company Limited
Societe des Tabacs, Cigares et Cigarettes, J Bastos de L'Afrique Centrale SA
B.A.T Kenya Limited
The Monrovia Tobacco Corporation
B.A.T (Malawi) Limited

Nigerian Tobacco Company Limited
Aureol Tobacco Company Limited
South African Eagle Insurance Company Limited
Utico Holdings Limited
B.A.T Uganda 1984 Limited
B.A.T Zimbabwe Limited
Skandinavisk Holding AS
Tabacanaria SA
Imasco Limited
Aracruz Celulose SA
Polo Industria e Comercio Ltda
The West Indian Tobacco Company Limited
ITC Ltd.
Pioneer Tobacco Company Limited
East Africa Tobacco Company (UK) Limited
The Raleigh Investment Company Limited
N.V. Kolffs Offeetdrukkerij
New Zealand Holdings Limited
W D & H O Wills (New Zealand) Limited
Rokel Leaf Tobacco Development Company Limited
Barclay Look
Tobacco Processors Zimbabwe (Private) Limited
Bidwells and King Limited
Farmers & Settlers Cooperative Insurance Company of Australia Limited
Compagnie de Bruxelles Risques Divers
Centro Hispano de Aseguradores y Reaseguradores de La Salud SA
Eagle Star Vida Compania Espanole de Seguros y Reaseguros SA
Chasyr de Inversion Mobiliarca Sociedad Anonima, Sociedad de Inversion Mobiliana
Allied Dunbar, James Capel Limited
Immobilien—Kommanditgesellschaft Kuhlmann and Company Saarlend--Center Neun Kirchen

Immobilien—Kommanditgesellschaft Dr Anderegg and Company Lohr—Center Koblenz
Maguary Agricola SA
Tobacos Florida Ltda
Witcel Sacifia
VST Industries Limited
Arab-Malaysian Eagle Assurance Berhad
Sociedad Portuguesa de Celulose SARL (Soporcel)
Cigarros de Canarias SA
Empresas La Moderna SA de CV
Eagle Star France SA
Eagle Star Vie SA
SICAV Eagle Investissement
Cabinet Serre SARL

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STATUTES INVOLVED

Public Law 95-213, sometimes known in its entirety as the Foreign Corrupt Practices Act of 1977, appears at pp. 18a-30a of the Appendix. Title IV of Public Law 97-290, commonly known as the Foreign Trade Antitrust Improvements Act of 1982, appears at p. 31a of the Appendix.

No. 90-923

SUPREME COURT OF THE UNITED STATES

October Term, 1990

BILLY LAMB and CARMON WILLIS
Petitioners
VS.
PHILIP MORRIS INCORPORATED
and
B.A.T INDUSTRIES PLC
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT, B.A.T INDUSTRIES PLC

STATEMENT OF THE CASE

This action was brought by two Central Kentucky burley tobacco farmers allegedly on behalf of a class of all Central Kentucky burley tobacco farmers similarly situated. The plaintiffs allege that defendant, B.A.T Industries PLC ("B.A.T Industries") and defendant, Philip Morris Incorporated ("Philip Morris"), somehow caused a decline in the market price for burley tobacco at Central Kentucky auction warehouses. Specifically, the plaintiffs allege that the conduct in Venezuela of B.A.T Industries' Venezuelan subsidiary, C.A. Cigarrera Bigott, Sucs.

("Bigott"), indirectly increased the "flood of undervalued imported tobacco into this country in competition with their product." Petition for Writ of Certiorari, p. 8. The plaintiffs complain only of increased competition from foreign tobacco growers. This action was purportedly brought pursuant to the Sherman Antitrust Act, 15 U.S.C. § 1, the Clayton Antitrust Act, 15 U.S.C. §§ 12 and 26, the Robinson-Patman Act, 15 U.S.C. § 13, and the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 and 78dd-2.

On June 28, 1989, the United States District Court for the Eastern District of Kentucky entered a judgment dismissing the complaint in its entirety against B.A.T Industries and Philip Morris on the ground that the action was barred by the act of state doctrine and that there was no implied private right of action under the Foreign Corrupt Practices Act. The plaintiffs appealed the judgment to the United States Court of Appeals for the Sixth Circuit. On September 28, 1990, the Court of Appeals rendered an opinion (reported as *Lamb* v. *Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990)), affirming the ruling of the District Court that there is no private right of action under the Foreign Corrupt Practices Act, but reversing and remanding the dismissal under the act of state doctrine on the basis of this Court's very recent opinion in *W.S. Kirkpatrick & Co., Inc.* v. *Environmental Tectonics Corp., International*, 493 U.S. ____, 110 S.Ct. 701, 107 L.Ed.2d 816 (1990). The plaintiffs did not seek a stay of the mandate, and the mandate of the Court of Appeals issued on October 22, 1990. On November 1, 1990, B.A.T Industries renewed its motion to dismiss the plaintiffs' antitrust claims on grounds other than the act of state doctrine. A status

conference has been set by the District Court for January 7, 1991, to address the issues in the litigation on remand.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEAL AS TO WHETHER THERE IS AN IMPLIED PRIVATE RIGHT OF ACTION UNDER THE FOREIGN CORRUPT PRACTICES ACT.

The plaintiffs claim that a "conflict in the circuits on this issue warrants an opinion by the Supreme Court resolving the question." Petition for Writ of Certiorari, p. 21. However, the plaintiffs admit that "[o]ther than the Sixth Circuit in the case at hand, no court has yet faced squarely the issue of whether private rights of action exist for parties injured by payments proscribed by the FCPA." Petition for Writ of Certiorari, p. 19. The Court of Appeals below noted that "[a]lthough the Foreign Corrupt Practices Act was enacted more than a decade ago, the question of whether an implied private right of action exists under the FCPA apparently is one of first impression at the federal appellate level." (footnotes omitted) Court of Appeals Opinion, 915 F.2d at 1027; Petitioners' Appendix at p. 14a.

Plaintiffs attempt to create a conflict in the circuits by citing at p. 20 of their Petition two cases which interpret Title II of Public Law 95-213 — *Indiana National Corp.* v. *Rich*, 712 F.2d 1180, 1184 (7th Cir. 1983), and *Jacobs* v. *Pabst Brewing Co.*, 549 F. Supp. 1050, 1062 (D. Del. 1982). Public Law 95-213, sometimes known in its entirety as the Foreign Corrupt Practices Act of 1977, contains two titles. Section 101 of Title I provides that Title I may be cited as

the "Foreign Corrupt Practices Act of 1977". Section 201 of Title II provides that Title II may be cited as the "Domestic and Foreign Investment Improved Disclosure Act of 1977". Title I is a penal statute which makes the bribery of foreign governmental officials a crime. Title II amends Section 13(d)(1) of the Securities Exchange Act of 1934 (commonly known as the Williams Act), and adds a new Section 13(g) to that Act. (Appendix, pp. 18a-30a.)

Because the cited cases discuss Title II and not Title I of Public Law 95-213, they are completely irrelevant to the issues presented in this case, which calls for an interpretation of Title I of that Act. The *Jacobs* case does, however, succinctly describe the difference in the analysis for determining whether there exists an implied private right of action under a new statute and an existing statute:

> If the legislation is new, the question is whether Congress intended to *create a remedy* to supplement any express enforcement provision. If Congress, however, is amending a statute which has already been held by the judiciary to include a private cause of action, the inquiry is different — the question is whether Congress intended to *preserve the preexisting remedy.* (emphasis supplied; footnote omitted)

Jacobs, supra, at 1056.

The courts have consistently held that a private right of action exists under the Williams Act. The only question, therefore, before the courts in the *Jacobs* and *Indiana National* cases was whether Congress had expressed an intent to preserve the preexisting remedy. Both courts held that Congress was aware of the preexisting remedy and had done nothing to express its intent that the remedy be abrogated. These cases have nothing to do with the entirely different analysis required in any case involving

application of Title I of the Act, which creates a new federal crime.

The plaintiffs contrast the *Jacobs* and *Indiana National* opinions with those in *McLean* v. *International Harvester Co.*, 817 F.2d 1214 (5th Cir. 1987), *Lewis* v. *Sporck*, 612 F. Supp. 1316 (N.D. Cal. 1985), *Eisenberger* v. *Spectex Industries, Inc.*, 644 F. Supp. 48 (E.D. N.Y. 1986), and *Shields* v. *Erickson*, 710 F. Supp. 686 (N.D. Ill. 1989), in an attempt to create a conflict in the circuits. Three of these cases, *Lewis, Eisenberger*, and *Shields*, construed Section 102 of Title I of the Act, which created a new Section 13(b)(2) of the Securities Exchange Act of 1934, codified as 15 U.S.C. § 78m(b)(2). The courts held that no private right of action is implied in Section 102. *Lewis* specifically held that the analysis in construing the Foreign Corrupt Practices Act (Title I) is different from that for cases involving Title II of Public Law 95-213, such as *Jacobs* and *Indiana National:*

> Even accepting the analysis by the *Jacobs* and *Rich* courts of the legal climate of Section 13(d), I believe that the opposite conclusion is required with respect to Section 13(b)(2). The crucial distinction is the extent to which the FCPA affected the two different statutes. The FCPA only slightly modified the statute which was Section 13(d), a statute that several courts had previously found to contain a private remedy. *See Jacobs* v. *Pabst Brewing Company*, 549 F. Supp. at 1059 n. 13. On the other hand, Section 13(b)(2), as enacted by the FCPA, was the archetypical "new" statute in *Merrill Lynch* terms; it was unique among the federal securities laws in both wording and purpose. (footnote omitted)

Lewis, supra, at 1328-29.

In the *McLean* case, the Court was called upon to decide whether the so-called Eckhardt Amendment to the FCPA (§ 103(b), Title I) creates a private right of action. The Court ruled that there was no implied private right of action. This is not inconsistent with the *Indiana National* and *Jacobs* cases, because *McLean* construed Title I of Public Law 95-213, not Title II. *McLean* is also completely consistent with the Court of Appeals Opinion in this case which construed § 103(a) and § 104(a) of Title I.

The cases construing Public Law 95-213 are entirely consistent with one another, and two principles of law relating to Public Law 95-213 may be gleaned from a review of these cases:

1. The courts have refused to imply a private right of action arising under any provisions of the FCPA (Title I) which constituted new legislation enacted after the decision in *Cort* v. *Ash*, 422 U.S. 66 (1975), because there was insufficient evidence of Congressional intent to create a new private cause of action.

2. The courts have retained the implied private right of action arising under those statutes modified by Title II because there was no evidence that Congress intended to eliminate the private cause of action recognized by prior court decisions.

These two principles derived from the cited case law are also consistent with this Court's recent pronouncements on the implication of private rights of action under federal statutes. See *Thompson* v. *Thompson*, 484 U.S. 174, 179 (1988); *Karahalios* v. *Nat. Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, ____, 109 S.Ct. 1282, 1286-87, 103 L.Ed. 2d 539, 549 (1989).

At p. 19 of their Petition, the plaintiffs also cite three federal cases which they claim "have permitted a defendant to raise the defense of violation of the FCPA by a plaintiff as an affirmative defense denying recovery as a violation of public policy." For this proposition, they cite *Sedco International, Inc. S.A.* v. *Cory*, 683 F.2d 1201, 1210 (8th Cir. 1982); *Instituto Nacional* v. *Continental Illinois National Bank*, 576 F. Supp. 985, 990 (N.D. Ill. 1983); and *Northrop Corp.* v. *Triad Financial Establishment*, 593 F. Supp. 928 (C.D. Cal. 1984). These cases have nothing to do with the implication of a private right of action under the FCPA. They merely suggest, in accordance with black letter contract law, that acts which violate the penal provisions of the law are against public policy, and therefore, contracts which contemplate the performance of such acts may be unenforceable.

The plaintiffs have failed to demonstrate a conflict among the circuits within the scope of Rule 10.1(a) of the rules of this Court.

II.

THE DECISION OF THE COURT OF APPEALS THAT NO PRIVATE RIGHT OF ACTION IS IMPLIED UNDER THE FOREIGN CORRUPT PRACTICES ACT IS CORRECT AND CONSISTENT WITH DECISIONS OF THIS COURT.

The Court of Appeals correctly ruled that the question of whether a private right of action exists under the FCPA must be determined by considering the four factors set out in *Cort* v. *Ash*, *supra*, at 78. The Court enunciated the four factors as follows:

> (1) whether the plaintiffs are among "the class for whose *especial* benefit" the statute was enacted;

(2) whether the legislative history suggests congressional intent to prescribe or proscribe a private cause of action;

(3) whether "implying such a remedy for the plaintiff would be 'consistent with the underlying purposes of the legislative scheme' "; and

(4) whether the cause of action is " 'one traditionally relegated to state law, in an area basically the concern of States, so that it would be inappropriate to infer a cause of action.' "

Court of Appeals Opinion, 915 F.2d at 1028; Petitioners' Appendix at p. 16a.

The Court of Appeals analyzed each of the four factors as follows:

1. "Especial Beneficiaries."

The Court of Appeals correctly noted that "the FCPA was primarily designed to protect the integrity of American foreign policy and domestic markets, rather than to prevent the use of foreign resources to reduce production costs. The plaintiffs, as competitors of foreign tobacco growers and suppliers of the defendants, cannot claim the status of intended beneficiaries of the congressional enactment under scrutiny." Court of Appeals Opinion, 915 F.2d at 1029; Petitioners' Appendix at p. 19a.

In order to show any kind of an injury from the alleged actions of the defendants in Venezuela, the plaintiffs must prove every link in a long chain reaction: they must prove that B.A.T Industries caused its Venezuelan subsidiary, Bigott, to make a donation to the Venezuelan Children's Foundation, a non-governmental organization; that the donation somehow passed through that Foundation to some official of the Venezuelan government (a fact the plaintiffs

have not even alleged in their complaint); that the bribed official of the Venezuelan government somehow froze or lowered the prices Venezuelan burley tobacco farmers received for their tobacco; and that the lowering of the price of burley tobacco in Venezuela somehow lowered the price of burley tobacco in Central Kentucky.[1] In fact, the plaintiffs can prove none of these elements. No payments were made to foreign officials. (Appendix, p. 16a.) Bigott imported no American tobacco. All the burley tobacco purchased by Bigott in Venezuela was processed in Venezuela, and Bigott exported no unmanufactured burley tobacco to the United States. (Rombaut Affidavit, Appendix, pp. 38a-40a, ¶¶ 6 and 9.) Bigott did not add to the nonexistent "flood" of imported burley tobacco of which the plaintiffs complain. The plaintiffs did not compete with Bigott in either the purchase or sale of burley tobacco. Those suffering such an indirect injury, if they have been injured at all,

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[1]The last link in the chain—the effect of the lowering of the price of Venezuelan tobacco on the Central Kentucky markets—may be the weakest in the chain. Despite the claim of the plaintiffs that there was a "flood" of Venezuelan tobacco being dumped on the domestic tobacco market, the Venezuelan burley tobacco did not even amount to a trickle. During the period of 1977 to 1981, the average yearly amount of all burley tobacco imported by the United States from Venezuela (37 metric tons; $33,000.00 in value) represented a mere 0.39% by volume and 0.24% by value of total burley tobacco imports, and an even more insignificant 0.01% by volume and 0.004% by value of U.S. burley tobacco production in the eight states producing burley tobacco. During 1982, 1983, and 1984, years for which the plaintiffs have complained, *no* Venezuelan burley tobacco was imported into the United States. See United States Department of Agriculture, *Tobacco: World Tobacco Situation*, FT 3-85 (March, 1985), Appendix at p. 43a; Kentucky Department of Agriculture, *Kentucky Tobacco Market: '83-'84 Report and Review, '84-'85 Marketing Preview*, Appendix at p. 44a.

by acts committed in foreign countries, cannot be the "especial beneficiaries" of the Foreign Corrupt Practices Act.[2]

2. Congressional Intent Concerning Private Rights of Action.

The Court of Appeals correctly ruled that there is no evidence whatsoever of any congressional intent to create a private right of action under the Foreign Corrupt Practices Act.

As the Court noted, the passage of the Foreign Corrupt Practices Act was achieved only after a hard-fought battle, during the course of which many compromises were effected:

> The availability of a private right of action apparently was never resolved (or perhaps even raised) at the conference that ultimately produced the compromise bill passed by both houses and signed into law; neither the FCPA as enacted nor the conference report mentions such a cause of action. . . . Because the conference report accompanying the final legislative compromise makes no mention of a private right of action, we infer that Congress intended no such result. (citations omitted)

Court of Appeals Opinion, 915 F.2d at 1029; Petitioners' Appendix at pp. 20a-21a.[3]

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[2]The indirectness of the purported injury to the plaintiffs is so great that one of the grounds upon which B.A.T Industries has moved the District Court on remand to dismiss the complaint in its entirety is that the alleged injuries are so remote that they do not rise to the level of cognizable antitrust injuries and, therefore, the plaintiffs have no standing to bring this action, and the District Court should dismiss it for lack of subject matter jurisdiction.

[3]The conference committee produced a compromise bill due to differences between the House and Senate bills. The Senate Report contained no mention of an implied private right of action. *Lewis, supra*, at 1330.

3. Consistency With the Legislative Scheme.

The Court below properly found that "[r]ecognition of the plaintiffs' proposed private right of action, in our view, would directly contravene the carefully tailored FCPA scheme presently in place." Court of Appeals Opinion, 915 F.2d at 1029; Petitioners' Appendix at p. 23a. The Court below recognized that Congress had put in place specific means for the enforcement of the FCPA, and that these means did not include a private right of action.

> Because this legislative action clearly evinces a preference for compliance in lieu of prosecution, the introduction of private plaintiffs, interested solely in post-violation enforcement, rather than pre-violation compliance, most assuredly would hinder congressional efforts to protect companies and their employees concerned about FCPA liability.

Court of Appeals Opinion, 915 F.2d at 1029-1030; Petitioners' Appendix at p. 23a.

4. Alternative Avenues of Redress.

The Court below correctly ruled that, even though no state statutes prohibit the bribery of foreign officials, the plaintiffs have an adequate remedy at law through the private rights of action contained in the United States antitrust laws. In fact, the plaintiffs are even now availing themselves of these remedies through their prosecution of this action on remand in District Court.

The plaintiffs cannot show that the decision below conflicts with decisions of this Court. Rule 10.1(c) of the Rules of the Supreme Court.

III.

THE QUESTION ASSERTED BY PETITIONERS CONCERNING A PRIVATE RIGHT OF ACTION UNDER THE FOREIGN CORRUPT PRACTICES ACT IS NOT PROPERLY PRESENTED BY THE FACTS OF THIS CASE.

As to B.A.T Industries, this case can be finally adjudicated without deciding the issue of whether a private right of action is implied by Title I of Public Law 95-213, because that statute does not apply to B.A.T Industries. B.A.T Industries fits into neither of the categories of companies regulated by the FCPA—it is neither an issuer nor a domestic concern. B.A.T Industries is a public limited company organized under the Companies Act of the United Kingdom, with its principal office in London, England. B.A.T Industries has not bought or sold tobacco in the United States. (MacInnes Affidavit, Appendix, pp. 34a-35a, ¶ 3.)

Section 103(a) of Title I created a new Section 30a of the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. § 78dd-1. Under this section, it is unlawful for any issuer of securities registered pursuant to Section 12 of the 1934 Act (15 U.S.C. § 78l), or which is required to file reports pursuant to Section 15(d) of the 1934 Act (15 U.S.C. § 78o) to make corrupt payments to foreign officials in order to obtain or retain business. There has been no allegation that B.A.T Industries is either an issuer of securities registered under Section 12 or an issuer required to make reports under Section 15(d) of the 1934 Act, and it is neither. (Appendix, pp. 1a-12a.)

Under Section 12(g)(3) of the 1934 Act, the Commission may exempt securities of a foreign issuer from the require-

ments of registration (15 U.S.C. § 78l(g)(3)). Pursuant to this authority, the Commission has provided an information-supplying exemption to foreign issuers that furnish the Commission with the same information required by the country of the issuer's domicile. 17 C.F.R. § 240.12g3-2 (b)(1). B.A.T Industries has utilized the information-supplying exemption to obtain exemption from registration under Section 12. List of Foreign Issuers Which Have Submitted Information Required by Exemption Relating to Certain Foreign Securities, 3 Fed. Sec. L. Rep. (CCH) ¶ 23,317. B.A.T Industries is not an issuer of securities registered under Section 12 of the 1934 Act subject to the proscriptions of Section 103(a) of the FCPA, 15 U.S.C. § 78dd-1.

The reporting requirements of Section 15(d) of the 1934 Act (15 U.S.C. § 78o(d)) apply only to issuers of securities registered under the Securities Act of 1933 (the "1933 Act"), 15 U.S.C. §§ 77a-77bbb. No securities issued by B.A.T Industries are registered under the 1933 Act. (MacInnes Affidavit, Appendix, p. 36a, ¶ 5.)

Under Section 104(a) of the FCPA, it is unlawful for any "domestic concern" to make corrupt payments to foreign officials in order to obtain or retain business. 15 U.S.C. § 78dd-2. A "domestic concern" is defined to include only those corporations which have their principal place of business in the United States, or which are organized under the laws of a state or territory of the United States. 15 U.S.C. § 78dd-2(d)(1). Neither B.A.T Industries nor Bigott is a domestic concern. B.A.T Industries is a public limited company organized under the Companies Act of the United Kingdom, with its principal office and place of business in London, England. Bigott, is a Venezuelan corporation. In enacting the FCPA, Congress was

concerned with the conduct abroad of American companies. The FCPA does not apply to the conduct of foreign corporations in foreign countries. The FCPA does not confer subject matter jurisdiction over the claim of Lamb and Willis against B.A.T Industries.

IV.

THERE IS NO ADVERSE RULING FROM THE COURT OF APPEALS CONCERNING THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1982 FROM WHICH THE PETITIONERS MAY SEEK REVIEW.

Plaintiffs' second question presented is framed as follows:

> 2. Does the Foreign Trade Antitrust Improvements Act of 1982 as codified at 15 U.S.C. § 6(a) (1982), make more stringent the jurisdictional standard for an antitrust complaint alleging a conspiracy to fix prices of *im*ported [sic] commerce?

Petition for Writ of Certiorari, p.i.

While the question as framed by plaintiffs may be interesting in an academic sense, it has never been considered by either the District Court or the Court of Appeals. There is no adverse ruling on this issue from which plaintiffs could appeal. In fact, the plaintiffs were successful on their appeal relating to dismissal of their antitrust claims in the District Court, and the plaintiffs cannot point to any error of the Court of Appeals in remanding the antitrust issues to the District Court. This Court should decline to consider a question in a petition for writ of certiorari which has not been considered by a lower court. *Patrick* v. *Burget*, 486 U.S. 94, 100 n.5 (1988).

The slate is clean in District Court on this matter, and the plaintiffs are free to urge the District Court to adopt any interpretation of the Foreign Trade Antitrust Improvements Act ("FTAIA") they choose. The plaintiffs have, in effect, requested this Court to give them and the District Court an advisory opinion on the effect of the FTAIA on this case, without allowing the District Court to first make any findings as to this issue and related issues.[4] The District Court, in its Opinion and Order, addressed only the Foreign Corrupt Practices Act issue and the issue of the act of state doctrine:

> However, inasmuch as the court has determined that this action is barred by the act of state doctrine and the Foreign Corrupt Practices Act of 1977, the court need not address this issue [the applicability of the FTAIA] or any other remaining issues.

District Court Opinion and Order, p. 16; Petitioners' Appendix at p. 24b.

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[4]B.A.T Industries, in its renewed motion to dismiss filed November 1, 1990, requested that the District Court dismiss the complaint on the following grounds:

a. This Court lacks subject matter jurisdiction over the claims alleged by the plaintiffs.

b. The plaintiffs lack standing to bring the claims asserted, in that they have suffered no antitrust injury.

c. The claims in the Complaint are barred by the act of state doctrine and the doctrine of petitioning immunity.

d. This Court lacks personal jurisdiction over B.A.T Industries.

e. This Court lacks venue over this action.

f. Service of process on B.A.T Industries was defective.

Renewed Motion to Dismiss, ¶ 3.

The Court of Appeals Opinion specifically remands these issues to the District Court:

> In rejecting the district court's invocation of the act of state doctrine, we do not pass judgment on whether the plaintiffs have set forth viable antitrust claims. The defendants interposed several alternative justifications for dismissal that the district court has not yet addressed. The defendants are free to raise these arguments to support a subsequent motion for dismissal or summary judgment following remand.

Court of Appeals Opinion, 915 F.2d at 1027, n.7; Petitioners' Appendix at p. 13a, n.7.

Because neither the Court of Appeals nor the District Court has addressed the issue of the applicability of the FTAIA to this case, and because no adverse ruling concerning the FTAIA exists at this point, it would be premature for this Court to give a speculative advisory opinion on the Act's applicability, particularly given the serious nature of the Motions to Dismiss which are now pending in the District Court.[5] Even if FTAIA issues had been

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[5]Honorable Scott Reed, the District Judge who entered the Memorandum Opinion and Order, noted at a hearing at which he stayed all discovery pending a decision on the Motions to Dismiss:

> The matter of jurisdiction concerns me and particularly that portion of the showing so far as goes to subject matter jurisdiction. . . . And, Mr. Lackey, I can't make any hard commitments, but I am going to make every attempt to move this Motion to Dismiss up and address myself to it as reasonably prompt as human frailty [sic] will permit me, and I can't give you any more exact proposition, but you are entitled to a decision. And certainly I think that this matter of subject matter jurisdiction is a critical point at which to seriously examine this lawsuit now.

Transcript of Hearing, p. 25, reprinted in Appendix, p. 32a.

considered and decided by the Court of Appeals, the issue as stated by the plaintiffs is not factually correct. The plaintiffs seek a construction of the FTAIA as applied to import commerce. The transaction with the Venezuelan Children's Foundation did not involve the import trade or import commerce of the United States. The Venezuelan transaction involved the purchase of tobacco in Venezuela from Venezuelan tobacco growers for use in Venezuela. B.A.T Industries exported no Venezuelan tobacco to the United States. (Rombaut Affidavit, Appendix, pp. 39a-40a, ¶¶ 6 and 9.)

CONCLUSION

The plaintiffs have not shown any reason that this Court should review the decision of the Court of Appeals below. Therefore, B.A.T Industries respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Counsel of Record for Respondent, B.A.T Industries PLC

APPENDIX

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IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

Civil Action Number 85-340

BILLY LAMB, CARMON WILLIS,
and KATHERINE GRADDY
on behalf of themselves and as representatives of the class defined herein, - - - *Plaintiff*,

v.

PHILLIP MORRIS, INCORPORATED
and B.A.T. INDUSTRIES PLC., - - - *Defendants.*

COMPLAINT—Filed August 21, 1985

The plaintiffs, Billy Lamb, Carmon Willis and Katherine Graddy, by their attorney, bring this civil action against the above-named Defendants, and each of them, and demanding trial by jury, and complain and allege as follows:

1. This action arises under statutes of the United States designed to protect trade and commerce against restraints and monopolies, being more particularly the Sherman Antitrust Act of July 2, 1980, as amended, (15 USC § 1 et seq.), the Clayton Act, as amended, (15 USC § 12 et seq.), and the Robinson-Patman Act, as amended, (15 USC § 13 et seq.). Jurisdiction and venue are vested in this court by section 1337 of Title 28 of the United States Code, and sections, 15, 22, 26 and 31 of Title 15 of the United States Code.

2. Plaintiffs, Billy Lamb, Carmon Willis, and Katherine Graddy, bring this action on behalf of themselves and all other sellers of burley tobacco grown within the counties of Scott, Madison, Jessamine, Bourbon, Fayette, Mercer, Clark and Woodford in the State of Kentucky, who consummated such sales of burley tobacco within the past six (6) years.

3. This action is brought in accordance with Rule 23 (a) and (b) of the Federal Rules of Civil Procedure. The class represented by the named Plaintiffs in this action consists of all persons who sold burley tobacco grown within the counties of Scott, Madison, Jessamine, Bourbon, Fayette, Mercer, Clark, and Woodford in the State of Kentucky, who consummated such sales of burley tobacco within the past six (6) years. Since the two (2) Defendants herein acted uniformly in connection with the named Plaintiffs and the class they represent, there exist questions of law and fact which are common to all members of the class, and which predominate over questions of law and fact which affect only individual members of the class. The impact of the offenses committed by both the Defendants is common to all the Plaintiffs, and therefore their claims are typical of the claims of their class. Since the named plaintiffs have interests in this action which are coincident with and not adverse to the class they represent, and since the named Plaintiffs individually have a substantial financial interest in this action, the named Plaintiffs will adequately protect the interest of the class they represent.

Moreover, the prosecution of separate actions by individual members of the Plaintiffs' class would create a risk of: (1) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the Defendants, or either of them, or (2) adjudications with respect to individual members of the class which would as a practical

matter be dispositive of the interests of the other members not parties to the adjudications or would substantially impair or impede their ability to protect their interests.

Finally, it is believed that the Defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate the requested final injunctive relief or corresponding declaratory relief with respect to all the class represented by the Plaintiffs.

4. By maintaining this action as a class action, savings in time, effort and expense will be achieved by both the courts and the parties to this action. One of the advantages of maintaining this action as a class action is that persons who are members of the class, and who have claims which might not otherwise warrant individual actions, will be provided with a method for the redress of their claims. Additionally, the maintenance of this action as a class action will eliminate the possibility of repetitious litigation which might result in the establishment of incompatible standards of conduct for the Defendants. Thus, a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

5. The Plaintiffs, Billy Lamb, Carmon Willis, and Katherine Graddy, are, and at all times relevant to this action were, resident citizens of Madison County or Woodford County, Kentucky.

6. The Plaintiffs are, or at all times relevant to this action were, growers of burley tobacco in Madison County or Woodford County, Kentucky.

7. The Defendants are large, integrated, multinational corporations engaged in the business, *inter alia*, of brokering, purchasing, selling, processing and producing tobacco, and conduct some, or all, of such enterprises within the counties of Scott, Madison, Jessamine, Fayette, Clark, Bourbon, Mercer, and Woodford in the State of Kentucky. The said companies require burley tobacco like that pro-

duced by the Plaintiffs and others of the class they represent to operate their business, and routinely through, or for, their agents, employees or assigns purchase such tobacco at Central Kentucky tobacco markets where Plaintiffs and their class sell their tobacco.

8. In addition to the purchase of burley tobacco produced in the United States of America, the Defendants routinely purchase tobacco fungible with American tobacco from foreign producers in such countries as Venezuela, Argentina, Brazil, Mexico, Nicaragua, Costa Rica, and other countries for resale, for brokering to other companies, and for use in the production of cigarettes and other tobacco products. The tobacco produced in the other countries patronized by the Defendants is sold in competition with the tobacco produced by the named Plaintiffs and the other members of the class which they represent, such that when the Defendants supply their need for tobacco from foreign producers they require less tobacco produced by American or domestic producers including that produced by the Plaintiffs and their class, and such that when the Defendants purchase tobacco from foreign producers at a price below the price of American or domestically produced tobacco, the price of American or domestically produced tobacco is affected adversely to the interests of the Plaintiffs and their class.

9. That on or about May 14, 1982, "C.A. Tabacalera National (CATANA)," a wholly owned subsidiary of Defendant, Phillip Morris, Incorporated, acting at the benefit, instruction, and behest of Defendant, Phillip Morris, Incorporated, and "C.A. Cigarrera Bigott, SUCS.", a wholly owned subsidiary of Defendant, B.A.T. Industries PLC. (whose former corporate name was British-American Tobacco Co., PLC.), acting at the benefit, instruction and behest of B.A.T. Industries PLC., entered into a contract with "La Fundacion Del Nino" (Children's Foundation)

of Caracas, Venezuela which provided, *inter alia*, that the two subsidiaries would make periodic "donations" to the Children's Foundation totalling approximately $12.5 million, in exchange for: (1) price controls on tobacco produced by the growers in Venezuela; (2) no price controls on the retail prices the tobacco companies charge for cigarettes; (3) the allowance of the "donations" as deductions from the gross income of the tobacco companies; and, (4) an agreement that the present tax rates on the tobacco companies shall remain the same. The contract was signed by Mrs. Betty Urdaneta De Herrera Campins, the president of the Children's Foundation and the wife of the then president of Venezuela; Dr. Jose Antonio Cordido Freztes, president of CATANA, and a member of the Board of Directors of Phillip Morris, Incorporated. Mr. Pedro Mumez De Caceres, general director of CATANA also signed for CATANA. Copies of the said contract in Spanish and English are attached hereto, along with two letters from the United States Department of Justice explaining the significance of the contracts.

10. Transactions similar to the one described in paragraph 9, above, have occurred between the aforementioned tobacco companies and the countries of Argentina, Mexico, Brazil, Venezuela, Nicaragua, Costa Rica and perhaps other nations both before and after May 14, 1982. Because the conduct complained about herein by the Plaintiffs involved continuing overt acts and continuous violations of the United States antitrust laws by the Defendants, and because the Defendants' conduct was intended to, and did, conceal the facts upon which the Plaintiffs base their complaint or deceived them into believing that they had no complaint, or by reason of the fraudulent nature of the conduct it was inherently self-concealing, Plaintiffs complain about, and allege damages from, the aforesaid similar conduct in Argentina, Mexico, Brazil, Nicaragua, Costa

Rica and otherwise in Venezuela, and other countries presently unknown to the Plaintiffs.

11. The aforesaid "donations" were not, in fact donations at all, but were illegal and unlawful inducements to certain foreign officials designated to unlawfully restrain interstate trade and commerce for the benefit of the Defendants, and to the detriment of the Plaintiffs and their class.

12. By the executing of the contracts described in paragraphs 9 and 10, above, the Defendants, and each of them, have knowingly and unlawfully combined, conspired, and agreed to restrain interstate trade and commerce in violation of the jurisdictional statutes mentioned in paragraph 1 of this complaint. It was part of said combination, conspiracy, and agreement, and an object and purpose thereof, to accomplish, *inter alia*, the following:

(a) arbitrarily, unlawfully, unreasonably and knowingly to lower, fix, control, set, stabilize and otherwise affect the price paid by Defendant companies for tobacco;

(b) to establish and maintain unreasonably high, excessive, monopolistic and noncompetitive retail prices for cigarettes and other tobacco products;

(c) arbitrarily, unlawfully, unreasonably and knowingly to prevent, suppress, and eliminate competition from any source in the purchase, sale, borkering [sic] or processing of tobacco;

(d) to agree upon uniform and identical and unreasonably low prices and wages to be paid to the foreign producers of tobacco;

(e) to establish and maintain unreasonably low, monopolistic and noncompetitive tax rates peculiar to themselves for their enterprises in the production, purchase, sale and brokering of tobacco products.

13. The aforesaid combination and conspiracy has had the following effect, among others:

(a) Prices paid for American or domestic tobacco have been lowered, fixed, stabilized, and maintained at an artificial and noncompetitive level;

(b) Price competition in the sale of American or domestic tobacco has been lowered, fixed, stabilized and maintained at an artificial and noncompetitive level;

(c) Sellers of tobacco including the Plaintiffs have been denied or have been impeded in obtaining the benefits of zealous brokering of tobacco at competitive terms.

14. As a result of the said combination, conspiracy and agreement, the Defendant companies have received, and are receiving, from the foreign nations mentioned herein above in paragraphs 8 and 10, tobacco in competition with tobacco produced by the Plaintiffs and their class at prices unlawfully lowered, fixed, controlled, set, stabilized and affected as aforesaid, which prices are unreasonably low. The reasonable prices for which the said tobacco produced by Plaintiffs and their class under natural and free competitive conditions would have been substantially more than the amounts which were, in fact, paid to them for such tobacco.

15. The Defendant, Phillip Morris, Incorporated is a Virginia corporation transacting business in the Eastern Federal Judicial District of Kentucky and is otherwise subject to the jurisdiction of courts in Kentucky pursuant to KRS 454.210 and has designated as agent for service of process in all of Kentucky CT Corporations System, Kentucky Home Life Building, Louisville, Kentucky 40202. Summons should therefore be served upon this Defendant by service upon the said designated process agent.

The Defendant, B.A.T. Industries PLC. (whose former corporate name was British-American Tobacco Co. PLC.) is an English corporation transacting business in the Eastern Federal Judicial District of Kentucky and is otherwise subject to the jurisdiction of courts in Kentucky pursuant to KRS 454.210 and has no agent for service of process in Kentucky known to the Plaintiffs, and summons should therefore be served upon this Defendant by service upon the Secretary of State of the Commonwealth, at Frankfort, Kentucky, pursuant to KRS 454.210 or pursuant to FRCP 4(d), (e), or (i). The last known corporate address of B.A.T. Industries PLC. is believed to be:

Windsor House
50 Victoria Station
London, England
SW1H0NL

16. As a result of the said combination, conspiracy, and agreement, the named Plaintiffs, and the class they represent, on behalf of whom this suit has been brought, have suffered damage and injury to their property, in an amount which is yet unknown to the Plaintiffs, but which the named Plaintiffs believe to be in excess of TWENTY MILLION ($20,000,000.00) DOLLARS. The named Plaintiffs, and the class they represent, on whose behalf this suit has been brought are accordingly entitled, under the provisions of 15 USC § 15 and other applicable law, to treble damages in an amount which is not yet ascertained, but which Plaintiffs believe in is excess of SIXTY MILLION ($60,000,000.00) DOLLARS. Plaintiffs are further entitled as follows: (1) to recover reasonable attorneys' fees for the services of their attorneys in this proceeding, together with their costs of suit; (2) to an injunction forbidding the Defendants from continuing to similarly contract in conspiracy to restrain trade; and (3) an order

closing the Panama Canal to the use of the Defendants pursuant to the Clayton Act, an [sic] amended, 15 USC § 31.

WHEREFORE, The Plaintiffs, Billy Lamb, Carmon Willis, and Katherine Graddy, for themselves and the class they represent, on behalf of whom this suit has been brought, pray:

1. That this Court adjudge and decree that the named Defendants have engaged in an unlawful combination and conspiracy in restraint of trade and commerce in the purchase, sale, production and brokering of tobacco and tobacco products to the damage of Plaintiffs and their class;

2. That judgment be entered against the Defendants, and each of them, by virtue of said combination and conspiracy in violation of the Sherman Act, the Clayton Act, and the Robinson-Patman Act in favor of the Plaintiffs and their class, for damages in the amount of SIXTY MILLION ($60,000,000.00) DOLLARS, or according to proof adduced at trial;

3. For an order enjoining and restraining the Defendants from unlawfully acting as described herein under any contract named herein or any similar contract;

4. For reasonable counsel fees and the costs of this action;

5. For an order closing the Panama Canal to the Defendants as violators of the Clayton Act pursuant to 15 USC § 31.

6. For an order determining that this cause may be taken as a class action, that the Plaintiffs may represent the class, and such other order pursuant to FRCP 23 as may be appropriate.

7. For such other and further relief as the case may require, the facts demand, and the Court may deem just and proper under the circumstances.

Dated this the 21 day of August, 1985.

(s) John F. Lackey
JOHN F. LACKEY
LACKEY & LACKEY, ATTORNEYS
142 North Second Street
Richmond, KY 40475

ATTORNEY FOR PLAINTIFFS
AND THEIR CLASS

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

Civil Actien No. 85-340

BILLY LAMB, Et Al., - - - - *Plaintiffs,*

v.

PHILLIP MORRIS INCORPORATED,
Et Al., - - - - - - - - - *Defendants.*

MOTION TO AMEND COMPLAINT AND FOR LEAVE TO FILE REPLY MEMORANDUM IN EXCESS OF FIVE PAGES

I. Come the plaintiffs, through counsel, and respectfully move the court, pursuant to Rule 15 of the Federal Rules of Civil Procedure, and for the reasons set forth, in the accompanying memorandum, for leave to amend their original complaint as follows:

1. In paragraph 1 of said complaint before the period in the first sentence thereof to add the words" ,and the Foreign Corrupt Practices Act of 1977 (15 USC s 78 dd-1 and 78 dd-2)."

2. In paragraph 13 of said complaint after subparagraph (c) add this additional sub-paragraph to read "(d) Plaintiffs and their class have been unable to sell all or substantially all of their tobacco crops for several years except to the Burley Tobacco Cooperative or "pool", which phenomenon has tended to destroy the lawful pattern of marketing burley tobacco and has partially created such

tremendous surpluses of burley tobacco as to imperil the future production of burley tobacco in Kentucky and elsewhere in the United States, and to prevent its export to customary nations which had heretofore purchased the crops of plaintiffs and their class."

3. In paragraph 14 of said complaint to add an additional sentence after the present end thereof to read "Such conduct had a direct, substantial and reasonably forseeable effect on commerce of the United States."

II. Plaintiffs further move for leave to file a reply memorandum to defendant Phillip Morris Incorporated's memorandum of thirty six (36) pages in excess of five (5) pages, but not greater than forty (40) pages.

(s) John F. Lackey
JOHN F. LACKEY
Attorney for Plaintiffs
142 North Second Street
Richmond, Kentucky 40475

NOTICE OF MOTION

PLEASE TAKE NOTICE that the foregoing Motion will be brought on for hearing before the Honorable Scott Reed, Judge, U.S. District Court, at the U.S. District Courthouse, Federal Building, Barr Street, Lexington, Kentucky, or such other location as the Court may assign, same to be heard at the convenience of the Court.

(s) John F. Lackey
JOHN F. LACKEY
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I, the undersigned attorney for plaintiffs, do hereby certify that a true and correct copy of the foregoing Motion was mailed this 1st day of November, 1985, to Hon. Robert M. Watt III, STOLL, KEENON and PARK, 1000 First Security Plaza, Lexington, Kentucky 40507 and to Hon. Abe Krash, Robert Weiner and Philip Horton, ARNOLD & PORTER, 1200 New Hampshire Avenue, N.W., Washington, D.C. 20036, Attorneys for Phillip Morris Incorporated, and to Hon. James Park, Jr., BROWN, TODD and HEYBURN, 1100 Vine Center, Lexington, Kentucky 40507, Attorney for defendant, B.A.T. Industries, PLC

(s) John F. Lackey
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

Civil Action No. 85-340

BILLY LAMB, *Et Al.*, - - - - - - *Plaintiffs,*

v.

PHILLIP MORRIS INCORPORATED,
Et Al., - - - - - - - - *Defendants.*

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO AMEND COMPLAINT AND TO FILE MORE LENGTHY MEMORANDUM

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1. By way of introduction let us first observe that plaintiffs believe they are entitled to amend their pleading pursuant to FRCP 15 at this time as a matter of right. Defendant, Phillip Morris Incorporated's (hereinafter PMI) motion to dismiss was not filed in conformity with Rule 7 of the Rules of the United States District Court of the Eastern District of Kentucky in that it exceeded fifteen (15) pages without conformity with the requirements of Ky. Civ. R. 76.12 (c) and (d) (1984). Had the additional matters required by such rules been appended to the said memorandum it would probably have exceeded the forty (40) page maximum permitted without leave of court. For such reason PMI is now technically in default and plaintiffs' amendment is "filed before a representative pleading is served".

However, plaintiffs, out of an abundance of caution, seek leave of court for their amendment, which Rule 15 says "shall be freely given."

The two minor requested amendments merely set forth additional jurisdictional authority granted or, perhaps, mandated by the United States Code in an action such as the instant case. No prejudice will result to either defendant by the granting of the amendment at this early stage of the lawsuit.

2. Plaintiffs, also out of an abundance of caution, move for leave to file a Reply Memorandum to defendant PMI's Memorandum dated October 16, 1985, of thirty-six (36) pages. Suffice it say in support of this motion that plaintiffs cannot even begin to answer defendant's authority within the five (5) pages authorized for reply briefs under local rule 7(b). Leave is requested to file a response not to exceed forty (40) pages, and including the additional matters required by the said local rule.

Respectfully submitted,

(s) John F. Lackey
ATTORNEY FOR PLAINTIFFS

COMPLAINT PARA. 9, EXHIBIT

LETTER DATED SEPTEMBER 28, 1983

Mr. John M. Fedders
Director, Division of Enforcement
Securities and Exchange Commission
Room 4000, 450 5th Street, N.W.
Washington, D.C. 20549

Attn: Gary Lynch

Re: Phillip Morris Tobacco Company, et al

Dear Mr. Fedders:

The Section received an investigative report indicating a subsidiary of Phillip Morris and a subsidiary of the British American Tobacco Company entered into a contract with the Children's Fund Foundation of Venezuela which raised some concern about a possible violation of the Foreign Corrupt Practices Act.

The contract provides that the two subsidiaries will make periodic "donations" to the Children's Fund Foundation, apparently a private charitable organization, totaling approximately 12.5 million dollars, in exchange for price controls on tobacco purchased from the growers in Venezuela, no price controls on the retail prices the tobacco companies charge for cigarettes, the amount of the "donations" must be allowable as deductions from the gross income of the tobacco companies, and the present tax rates are to remain the same. The wife of the President of Venezuela is the President of the Foundation. Apparently, similar transactions have occurred in Argentina, Mexico, Brazil and Costa Rica.

We have declined to consider the matter for investigation inasmuch as it lacks any evidence of a payment to a

foreign official. However, the transaction is unusual enough in our experience to bring the matter to your attention. Enclosed is a copy of the contract for whatever consideration and use of the Commission.

Sincerely,

Robert W. Ogren
Chief, Fraud Section
Criminal Division

By:

James J. Graham
Deputy Chief, Fraud Section

Enclosure

Foreign Corrupt Practices Act of 1977
91 Stat. 1494

PUBLIC LAW 95-213

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

TITLE I—FOREIGN CORRUPT PRACTICES

SHORT TITLE

SEC. 101. This title may be cited as the "Foreign Corrupt Practices Act of 1977".

ACCOUNTING STANDARDS

SEC. 102. Section 13(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78q(b)) is amended by inserting "(1)" after "(b)" and by adding at the end thereof the following:

"(2) Every issuer which has a class of securities registered pursuant to section 12 of this title and every issuer which is required to file reports pursuant to section 15(d) of this title shall—

"(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and

"(B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—

"(i) transactions are executed in accordance with management's general or specific authorization;

"(ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

"(iii) access to assets is permitted only in accordance with management's general or specific authorization; and

"(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

"(3)(A) With respect to matters concerning the national security of the United States, no duty or liability under paragraph (2) of this subsection shall be imposed upon any person acting in cooperation with the head of any Federal department or agency responsible for such matters if such act in cooperation with such head of a department or agency was done upon the specific, written directive of the head of such department or agency pursuant to Presidential authority to issue such directives. Each directive issued under this paragraph shall set forth the specific facts and circumstances with respect to which the provisions of this paragraph are to be invoked. Each such directive shall, unless renewed in writing, expire one year after the date of issuance.

"(B) Each head of a Federal department or agency of the United States who issues a directive pursuant to this paragraph shall maintain a complete file of all such directives and shall, on October 1 of each year, transmit a summary of matters covered by such directives in force at any time during the previous year to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate".

FOREIGN CORRUPT PRACTICES BY ISSUERS

SEC. 103. (a) The Securities Exchange Act of 1934 is amended by inserting after section 30 the following new section:

"FOREIGN CORRUPT PRACTICES BY ISSUERS

"SEC. 30A. (a) It shall be unlawful for any issuer which has a class of securities registered pursuant to section 12 of this title or which is required to file reports under section 15(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

"(1) any foreign official for purposes of—

"(A) influencing any act or decision of such foreign official in his official capacity, including a decision to fail to perform his official functions; or

"(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentalilty,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

"(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

"(A) influencing any act or decision of such party, official, or candidate in its or his official capacity, including a decision to fail to perform its or his official functions; or

"(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person; or

"(3) any person, while knowing or having reason to know that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

"(A) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, including a decision to fail to perform his or its official functions; or

"(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

"(b) As used in this section, the term 'foreign official' means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of such government or department, agency, or instrumentality. Such term does not include any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially ministerial or clerical.".

(b)(1) Section 32(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78ff(a)) is amended by inserting "(other than section 30A)" immediately after "title" the first place it appears.

(2) Section 32 of the Securities Exchange Act of 1934 (15 U.S.C. 78ff) is amended by adding at the end thereof the following new subsection:

"(c)(1) Any issuer which violates section 30A(a) of this title shall, upon conviction, be fined not more than $1,000,000.

"(2) Any officer or director of an issuer, or any stockholder acting on behalf of such issuer, who willfully violates section 30A(a) of this title shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

"(3) Whenever an issuer is found to have violated section 30A(a) of this title, any employee or agent of such issuer who is a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States (other than an officer, director, or stockholder of such issuer), and who willfully carried out the act or practice constituting such violation shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

"(4) Whenever a fine is imposed under paragragh (2) or (3) of this subsection upon any officer, director, stockholder, employee, or agent of an issuer, such fine shall not be paid, directly or indirectly, by such issuer.".

FOREIGN CORRUPT PRACTICES BY DOMESTIC CONCERNS

SEC. 104. (a) It shall be unlawful for any domestic concern, other than an issuer which is subject to section 30A of the Securities Exchange Act of 1934, or any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an

offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

(A) influencing any act or decision of such foreign official in his official capacity, including a decision to fail to perform his official functions; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

(A) influencing any act or decision of such party, official, or candidate in its or his official capacity, including a decision to fail to perform its or his official functions; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing or having reason to know that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political

party or official thereof, or to any candidate for foreign political office, for purposes of—

(A) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, including a decision to fail to perform his or its official functions; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

(b)(1)(A) Except as provided in subparagraph (B), any domestic concern which violates subsection (a) shall, upon conviction, be fined not more than $1,000,000.

(B) Any individual who is a domestic concern and who willfully violates subsection (a) shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(2) Any officer or director of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(3) Whenever a domestic concern is found to have violated subsection (a) of this section, any employee or agent of such domestic concern who is a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States (other than an officer, director, or stockholder acting on behalf of such domestic concern), and who willfully carried out the act or practice constituting

such violation shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(4) Whenever a fine is imposed under paragraph (2) or (3) of this subsection upon any officer, director, stockholder, employee, or agent of a domestic concern, such fine shall not be paid, directly or indirectly, by such domestic concern.

(c) Whenever it appears to the Attorney General that any domestic concern, or officer, director, employee, agent, or stockholder thereof, is engaged, or it about to engage, in any act or practice constituting a violation of subsection (a) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing a permanent or temporary injunction or a temporary restraining order shall be granted without bond.

(d) As used in this section:

(1) The term "domestic concern" means (A) any individual who is a citizen, national, or resident of the United States; or (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

(2) The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality. Such term does not include any employee of a foreign government or any department, agency, or instrumen-

tality thereof whose duties are essentially ministerial or clerical.

(3) The term "interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof. Such term includes the intrastate use of (A) a telephone or other interstate means of communication, or (B) any other interstate instrumentality.

TITLE II—DISCLOSURE

SEC. 201. This title may be cited as the "Domestic and Foreign Investment Improved Disclosure Act of 1977".

SEC. 202. Section 13(d)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78m) is amended to read as follows:

"(d)(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 12 of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 12(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, is directly or indirectly the beneficial owner or more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations, prescribe as necessary or appropriate in the public interest or for the protection of investors—

"(A) the background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected;

"(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 3(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

"(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

"(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the background, identity, residence, and citizenship of each such associate; and

"(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or

option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.".

SEC. 203. Section 13 of the Securities Exchange Act of 1934, as amended (15 U.S.C. 78m), is amended by adding at the end thereof the following new subsection:

"(g)(1) Any person who is directly or indirectly the beneficial owner of more than 5 per centum of any security of a class described in subsection (d)(1) of this section shall send to the issuer of the security and shall file with the Commission a statement setting forth, in such form and at such time as the Commission may, by rule, prescribe—

"(A) such person's identity, residence, and citizenship; and

"(B) the number and description of the shares in which such person has an interest and the nature of such interest.

"(2) If any material change occurs in the facts set forth in the statement sent to the issuer and filed with the Commission, an amendment shall be transmitted to the issuer and shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

"(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a 'person' for the purposes of this subsection.

"(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

"(5) In exercising its authority under this subsection, the Commission shall take such steps as it deems necessary or appropriate in the public interest or for the protection of investors (A) to achieve centralized reporting of information regarding ownership, (B) to avoid unnecessarily duplicative reporting by and minimize the compliance burden on persons required to report, and (C) to tabulate and promptly make available the information contained in any report filed pursuant to this subsection in a manner which will, in the view of the Commission, maximize the usefulness of the information to other Federal and State agencies and the public.

"(6) The Commission may, by rule or order, exempt, in whole or in part, any person or class of persons from any or all of the reporting requirements of this subsection as it deems necessary or appropriate in the public interest or for the protection of investors.

"(h) The Commission shall report to the Congress within thirty months of the date of enactment of this subsection with respect to (1) the effectiveness of the ownership reporting requirements contained in this title, and (2) the desirability and the feasibility of reducing or otherwise modifying the 5 per centum threshold used in subsections (d)(1) and (g)(1) of this section, giving appropriate consideration to—

"(A) the incidence of avoidance of reporting by beneficial owners using multiple holders of record;

"(B) the cost of compliance to persons required to report;

"(C) the cost to issuers and others of processing and disseminating the reported information;

"(D) the effect of such action on the securities markets, including the system for the clearance and settlement of securities transactions;

"(E) the benefits to investors and to the public;

"(F) any bona fide interests of individuals in the privacy of their financial affairs;

"(G) the extent to which such reported information gives or would give any person an undue advantage in connection with activities subject to sections 13(d) and 14(d) of this title;

"(H) the need for such information in connection with the administration and enforcement of this title; and

"(I) such other matters as the Commission may deem relevant, including the information obtained pursuant to section 13(f) of this title."

SEC. 204. Section 15(d) of the Securities Exchange Act of 1934 is amended by inserting immediately before the last sentence the following new sentence: "The Commission may, for the purpose of this subsection, define by rules and regulations the term 'held of record' as it deems necessary or appropriate in the public interest or for the protection of investors in order to prevent circumvention of the provisions of this subsection."

Approved December 19, 1977.

Title IV—Foreign Trade Antitrust Improvements
96 Stat. 1246

PUBLIC LAW 97-290

SHORT TITLE

SEC. 401. This title may be cited as the "Foreign Trade Antitrust Improvements Act of 1982".

AMENDMENT TO SHERMAN ACT

SEC. 402. The Sherman Act (15 U.S.C. 1 et seq.) is amended by inserting after section 6 the following new section:

"SEC. 7. This Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

"(1) such conduct has a direct, substantial, and reasonably foreseeable effect —

"(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

"(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

"(2) such effect gives rise to a claim under the provisions of this Act, other than this section.

If this Act applies to such conduct only because of the operation of paragraph (1)(B), then this Act shall apply to such conduct only for injury to export business in the United States."

Approved October 8, 1982.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

Lexington Civil No. 85-340

BILLY LAMB, CARMON WILLIS,
KATERINE [sic] GRADDY

v.

PHILLIP MORRIS, INCORPORATED
B.A.T. INDUSTRIES PLC.

TRANSCRIPT OF HEARING—MOTION TO COMPEL BEFORE THE HONORABLE SCOTT REED.

Lexington, Kentucky, May 7, 1987, 1:30 P.M.
Page 25:

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* * *

THE COURT:

The matter of jurisdiction concerns me and particularly that portion of the showing so far as goes to subject matter jurisdiction. In view of what we have before us and what we have been dealing with sporadically, I'm going to at this point state that the motion of the defendant Phillip Morris to stay discovery and the motion of the defendant B.A.T. for a protective order are hereby granted. Discovery in this matter is hereby stayed until resolution of the pending motion to dismiss. Plaintiffs motion to compel answers to plaintiffs interrogatories is hereby denied without prejudice. That will put the record in shape and I will immediately address myself to the motion to dismiss. And, Mr. Lackey, I can't make any hard commit-

ments, but I am going to make every attempt to move this motion to dismiss up and address myself to it as reasonably prompt as human frailty [sic] will permit me, and I can't give you any more exact proposition, but you are entitled to a decision. And certainly I think that this matter of subject matter jurisdiction is a critical point at which to seriously examine this lawsuit now.

THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action Number 85-340

BILLY LAMB, CARMON WILLIS,
and KATHERINE GRADDY - - - - *Plaintiffs*
on behalf of themselves and
as representatives of the
class defined herein

v.

PHILLIP MORRIS, INCORPORATED
and B.A.T INDUSTRIES P.L.C. - - *Defendants*

AFFIDAVIT

I, Ian Malcolm MacInnes of Windsor House, 50 Victoria Street, London SW 1 make oath and say as follows:—

1. I am the secretary of B.A.T Industries p.l.c. ("B.A.T Industries") and I reside in London, England. I have personal knowledge of the facts contained in this affidavit, and I have read the complaint in this action.

2. B.A.T Industries is a public limited company organised under the Companies Acts of the United Kingdom. B.A.T Industries' registered office is at Windsor House, 50 Victoria Street, London SW1H ONL, England.

3. During the period relevant to the complaint:
(a) B.A.T Industries has never manufactured or sold any goods or products, including tobacco, anywhere in

the United State of America, including the Commonwealth of Kentucky and the Eastern District thereof;

(b) B.A.T Industries has never purchased any tobacco anywhere in the United States of America, including the Commonwealth of Kentucky and the Eastern District thereof;

(c) B.A.T Industries has never maintained any office or place of business in the United States of America, including the Commonwealth of Kentucky and the Eastern District thereof;

(d) B.A.T Industries has never owned or possessed any real estate or any personal property of any kind located within the United States of America, including the Commonwealth of Kentucky and the Eastern District thereof;

(e) B.A.T Industries has not maintained a bank account or a telephone listing anywhere within the United States of America, including the Commonwealth of Kentucky and the Eastern District thereof;

(f) B.A.T Industries has never had any officers or employees who have been employed on a regular basis anywhere in the United States of America, including the Commonwealth of Kentucky and the Eastern District thereof;

(g) B.A.T Industries does not pay any taxes to the United States or America or any political subdivision thereof, including the Commonwealth of Kentucky.

4. During the period relevant to the complaint, B.A.T Industries has invested in the shares of numerous corporations throughout the world, either directly or through subsidiaries of B.A.T Industries, including corporations based in the United States of America. From time to time, officers, directors and other agents and employees of B.A.T Industries ("B.A.T Industries Officials") make

temporary visits to the United States of America, including the Western District of Kentucky, for the purpose of maintaining liaison with the United States subsidiaries. During such temporary visits, B.A.T Industries officials do not assume the day-to-day management of the internal affairs of any United States subsidiary. The acts complained of in the complaint in this proceeding are completely unrelated to such temporary visits by B.A.T Industries officials to B.A.T Industries' United States subsidiaries. The claim attempted to be set forth in the complaint does not arise out of any contact by B.A.T Industries with the United States of America, including the Commonwealth of Kentucky.

5. None of the ordinary shares issued by B.A.T Industries are bought or sold on any market within the United States of America, and no securities issued by B.A.T Industries are registered under the United States federal securities laws. So far as I am aware only American Depository Receipts ("ADRs"), representing ordinary shares of B.A.T Industries deposited with the Morgan Guaranty Trust Company of New York, Irving Trust Company, Citibank and Bank of New York, are traded on the American stock exchange. B.A.T Industries was not a party to any registration statement respecting the ADRs filed with the Securities and Exchange Commission, and B.A.T Industries was not the issuer of the ADRs under United States federal securities laws and regulations. B.A.T Industries reimburses one of its United States subsidiaries for expenses incurred in furnishing information in the name of B.A.T Industries to the United States financial community relevant to the ADRs concerning B.A.T Industries and its holdings.

(s) I. M. MacInnes

Sworn at Windsor House
50 Victoria Street
in the City of Westminster
this 18th day of October 1985
before me

(s) J. R. Williams
Solicitor

THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action Number 85-340

BILLY LAMB, CARMON WILLIS,
and KATHERINE GRADDY - - - - *Plaintiffs*
on behalf of themselves and
as representatives of the
class defined herein

v.

PHILLIP MORRIS, INCORPORATED
and B.A.T. INDUSTRIES P.L.C. - - - *Defendants*

AFFIDAVIT

Peter Rombaut, being duly sworn, states and deposes as follows:—

1. I am Peter John Rombaut, and I presently reside at Quinta Araguaney, Calle Santa Anna, El Pedregal del Country Club, Caracas, Venezuela.
2. I am now employed as President and General Manager of C.A. Cigarerra Bigott, Sucs. (hereinafter "Bigott"), in Los Ruices, Caracas, Venezuela, and I have been employed by Bigott since October 1980. I am in the United Kingdom on a temporary visit.
3. I have personal knowledge of the facts contained in this affidavit, and I have read the complaint in this proceeding.

4. Bigott is a corporation organised and existing under the laws of the Republic of Venezuela. All of the issued and outstanding capital stock of Bigott is held for the benefit of B.A.T Industries p.l.c. ("B.A.T Industries") through one or more subsidiaries of B.A.T Industries, all of which subsidiaries are organised under the Companies Acts of the United Kingdom.
5. Although from time to time Bigott has liaison with and guidance from its parent company in London, the management of the day-to-day affairs of Bigott is conducted in Venezuela by the Board of Directors and officers of Bigott.
6. During the period relevant to the complaint, all Venezuelan domestic tobacco purchased by Bigott was processed and manufactured in Venezuela into finished tobacco products. During the period relevant to this complaint, Bigott exported no unmanufactured Venezuelan tobacco.
7. During the period 1974 to July 1979, the price paid by Bigott for unmanufactured Venezuelan tobacco was fixed by the Venezuelan government. From July 1979 to the present, the price paid by Bigott for such tobacco was fixed by contracts negotiated with Associacion Venezolana de Cultivadores de Tabaco (The Venezuelan Association of Tobacco Growers) (hereinafter referred to as the "tobacco producers cooperative"). The price at which finished cigarettes could be sold in Venezuela was regulated and controlled by the Venezuelan government until September 1979 and during the period July 1981 through April 1982. The Venezuelan government levied a tax on the manufacture of cigarettes.
8. For most of the time relevant to the complaint, the price paid the Venezuelan tobacco producers cooperative exceeded the price paid for similar grades of Ameri-

can burley tobacco. The average price paid the Venezuelan tobacco producers exceeded US $2.00 per pound. This situation existed until the Venezuelan bolivar was devalued in February 1983.

9. At all times relevant to the complaint, the importation into Venezuela of unmanufactured tobacco, including American tobacco, was controlled by the Venezuelan government. During this period, Bigott imported no American tobacco into Venezeula.

10. During the period 1979 to 1982, the tobacco producers cooperative solicited substantial donations from Bigott to an independent Venezuelan charitable foundation unrelated to Bigott, La Fundacion del Nino (the "Children's Foundation"). The purpose of the proposed donations was the protection and social development of infants, children and the family, especially of the rural population which live or work in the tobacco producing regions of Venezuela. The donations were to be earmarked for teaching, cultural, sports and medical assistance programmes. The Children's Foundation is a national charity involved for many years in the domestic, cultural and social affairs of Venezuela. By tradition, the wife of the president of Venezuela serves as President of the Children's Foundation. With any change of administration in the government of Venezuela, there has been a corresponding change in the presidency of the Children's Foundation.

11. Bigott was willing to make the substantial donations to the Children's Foundation requested by the tobacco producers cooperative if economic circumstances within Venezuela allowed Bigott to have funds available to do so. During the period relevant to the complaint:

(a) The costs incurred by Bigott in the tobacco business escalated, because of the impact of substantial inflation on the Venezuelan economy;

(b) The prices paid by Bigott to the Venezuelan tobacco producers cooperative exceeded rises in the Venezuelan Central Bank cost of living index;

(c) The excise tax imposed by the Venezuelan government on cigarettes was increased;

(d) The Venezuelan government from time to time controlled the actual price at which Bigott could sell its cigarettes, and the price increases permitted by this government were not enough to offset Bigott's increased costs.

12. Unless economic circumstances permitted Bigott to operate at an acceptable profit, Bigott would not be able to make the donations to the Children's Foundation requested by the tobacco producers cooperative. Therefore, Bigott's agreement to make the donations was made subject to four conditions affecting Bigott's ability to make the donations, namely:

(a) The donations would be deductible for the purpose of determining Bigott's net taxable income;

(b) The existing contracts with the tobacco producers cooperative would be maintained;

(c) The retail price of cigarettes would no longer be controlled; and

(d) The current rate of taxation on manufacture and sale of cigarettes would be maintained.

13. Bigott's agreement in 1982 to make donations to the Children's Foundation was widely publicised throughout Venezuela, both in the national press and on television.

Further the affiant saith not.

(s) P. Rombaut

Sworn at Windsor House
50 Victoria Street
in the City of Westminster
this 25th day of October 1985
before me

(s) J. R. Williams
Solicitor

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREIGN AGRICULTURE CIRCULAR
TOBACCO
WORLD TOBACCO SITUATION

[Table from Photocopy]

TABLE 11: TOBACCO, UNMANUFACTURED: U.S. CALENDAR YEAR IMPORTS FOR CONSUMPTION BY TYPE AND COUNTRY OF ORIGIN, AVERAGE 1977-81, ANNUAL 1982-84

COMMODITY AND COUNTRY OF ORIGIN	QUANTITY (IN METRIC TONS)				VALUE (IN THOUSANDS OF DOLLARS)			
	5-Year Avg. 1977-1981	1982	1983	1984	5-Year Avg. 1977-1981	1982	1983	1984
BURLEY								
VENEZUELA	37	0	0	0	33	2	0	0

KENTUCKY DEPARTMENT OF AGRICULTURE
KENTUCKY TOBACCO MARKET
'83 - '84 Report and Review
'84 - '85 Marketing Preview
[Table from Photocopy]

BURLEY TOBACCO
PRODUCTION, VALUE & SEASON AVERAGE
EIGHT STATE BURLEY BELT
1968 - 1983

CROP	PRODUCTION	VALUE	AVERAGE PRICE	CROP	PRODUCTION	VALUE	AVERAGE PRICE
	(000 Lbs.)	($000)	(¢ Per Lb.)		(000 Lbs.)	($000)	(¢ Per Lb.)
1968	563,367	415,133	73.7	1976	678,976	774,998	114.1
1969	591,395	411,564	69.6	1977	617,280	740,626	120.0
1970	560,545	404,919	72.2	1978	626,273	821,705	131.2
1971	472,576	382,421	80.9	1979	445,822	647,334	145.2
1972	601,006	476,228	79.2	1980	560,816	930,394	165.9
1973	450,416	418,335	92.9	1981	729,752	1,318,662	180.7
1974	612,649	696,590	113.7	1982	821,918	1,487,672	181.0
1975	639,056	674,448	105.5	1983	481,439	853,591	177.3